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IN THE

Supreme Court of the United States

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), this Court held that state-law usury claims against federally chartered, federally insured banks are completely preempted by provisions of the National Bank Act of 1864 now codified at 12 U.S.C. §§ 85-86. The first question presented here is whether state-law usury claims against *state*-chartered, federally insured banks are likewise completely preempted by a provision of the Depository Institutions Deregulation and Monetary Control Act of 1980 now codified at 12 U.S.C. § 1831d.

2. In *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), this Court held that the term "interest" under 12 U.S.C. § 85 means not only periodic percentage interest rates but also many types of fees charged in connection with a loan (or other extension of credit). The second question presented here is whether the decision below conflicts with *Smiley* in that the court of appeals used a definition of "interest" that was limited to periodic percentage interest rates.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the case caption, the following were parties in the court of appeals: Ace Securities Corp. Home Loan Trust 1999-A; Associates First Mortgage Capital Corp.; CIT Group; Contimortgage Corp; Master Financial; Norwest Home Improvement, Inc.; PSB Lending Corp.; Challenge Realty; German American Capital Corp.; UBS Real Estate Securities, Inc.; Countrywide Home Loans, Inc.; JPMorgan Chase Bank, N.A.; Banc One Financial Services Inc.; PFF Bank & Trust; Western Interstate Bancorp.

CORPORATE DISCLOSURE STATEMENT

US Bank National Association ND and US Bank National Association are wholly owned subsidiaries of U.S. Bancorp, a publicly held corporation. U.S. Bancorp does not have a parent corporation and no publicly held company owns 10% or more of its stock.

FirstPlus Home Loan Trust 1996-2 is an express trust created under New York trust law, while FirstPlus Home Loan Owner Trusts 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5 are Delaware statutory trusts created under the Delaware statutory trust statute.

Wilmington Trust Company is a Delaware banking corporation that is wholly owned by Wilmington Trust Corporation. Wilmington Trust Corporation does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Goleta National Bank, now known as Community West Bank, is a California corporation. All of its stock is owned by the holding company Community West Bancshares.

Residential Funding Company, LLC, has the following parent company: GMAC-RFC Holding Company, LLC. General Motors Corporation is a publicly held corporation that owns 10% or more of the interest in Residential Funding Company, LLC, through ownership of stock in one or more companies.

Sovereign Bank is a subsidiary of Santander Holdings USA, Inc. which is a Virginia holding company formerly known as Sovereign Bancorp, Inc. Banco Santander, S.A., a publicly held corporation, is the parent of Santander Holdings USA, Inc. and owns 10% or more of its stock.

HSBC Finance Corporation, formerly known as Household Finance Corporation, is wholly owned by HSBC North America Holdings, Inc. No publicly held company directly owns 10% or more of HSBC Finance Corporation's stock.

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US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

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Sovereign Bank; and HSBC Financial Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 575 F.3d 794. The district court's order denying respondents' motion to remand the case to state court (App. 15a-17a) is unreported, as are its orders granting petitioners' motion to dismiss the complaint (App. 19a-20a) and denying reconsideration of the dismissal (App. 21a-22a).

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2009. A timely petition for rehearing en banc was denied on November 24, 2009. *See* App. 23a. On February 16, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 24, 2010. *See* Appl. No. 09A746. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and is unaffected by 28 U.S.C. § 1447(d) because petitioners seek review not of a remand order by a district court but of the judgment of the court of appeals, *see, e.g.*, *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947) (citing *Gay* v. *Ruff*, 292 U.S. 25 (1934)).

STATUTORY PROVISIONS INVOLVED

Section 30 of the National Bank Act of 1864 (codified at 12 U.S.C. §§ 85-86) and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (codified at 12 U.S.C. § 1831d) are set forth in the Appendix (at 25a-27a).

STATEMENT

In this case, a California state bank charged fees to Missouri residents for the origination of second-mortgage loans. Although the fees were permissible under California law, the borrowers brought a putative class action in Missouri state court on the ground that the fees violated Missouri law. Had the bank been a national bank, the National Bank Act would have authorized it to charge the fees in question and permitted removal of the case to federal court. The issue here is whether the twin provision of federal law that applies to state banks, a provision Congress adopted as part of the Depository Institutions Deregulation and Monetary Control Act of 1980, similarly allowed the state bank to charge the fees and authorized removal of the lawsuit to federal court.

1. With exceptions not relevant here, federal law permits a defendant who has been sued in state court to remove the case to federal district court if the case properly could have been brought in federal court in the first place, i.e., if the district court has original jurisdiction over any of the claims. *See* 28 U.S.C. § 1441. One category of cases over which federal district courts have original jurisdiction, and that thus can be removed from state court, is "all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331.

Whether a lawsuit arises under federal law (and is therefore removable) is normally determined using the "well-pleaded complaint" rule, under which a court considers only the claims properly pleaded in the complaint. *See, e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004); *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 113 (1936). "The rule makes the plaintiff the master of

the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987).

One exception to the well-pleaded complaint rule is the doctrine of "complete preemption," which applies "when a federal statute wholly displaces [a] state-law cause of action." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). In that circumstance, federal law does not merely provide a defense to a state-law claim; rather, the claim is deemed to arise under federal law and therefore may be removed to federal court (when originally filed in state court). *See id.* "This is so because '[w]hen the federal statute completely pre-empts the state-law cause of action, a claim that comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.'" *Aetna Health*, 542 U.S. at 207-208 (alteration in original) (quoting *Anderson*, 539 U.S. at 8).[1]

Congress may expressly provide for complete preemption. *See El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 484 (1999) (explaining that 42 U.S.C. § 2201(n)(2) explicitly "transforms into a federal action 'any public liability action arising out of ... a nuclear incident,'" by "provid[ing] for removal to a federal court as of right if a putative [such] action is brought in a state court" (quoting the statute)). Express legislative direction is not required, however; this Court has thus far identified three instances in which a federal law completely preempts certain state-law claims despite

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[1] Complete preemption flows from an "independent corollary" to the well-pleaded complaint rule, namely that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998).

the absence of statutory language explicitly commanding that result.

First, in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court held that section 301 of the Labor Management Relations Act of 1947 (LMRA), Pub. L. No. 80-101, 61 Stat. 136, completely preempted a state-law claim to enforce a no-strike clause in a collective bargaining agreement. *See* 390 U.S. at 559-560; *see also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983) ("The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" (quoting § 301)). *Second*, in *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court held that section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, completely preempted a state-law claim charging improper processing of benefits under an ERISA plan. *See* 481 U.S. at 64-67. *Third*—and of particular relevance to this case—in *Beneficial National Bank* v. *Anderson*, the Court held that the National Bank Act of 1864 (NBA), ch. 106, 13 Stat. 99, completely preempted state-law usury claims against national banks, i.e., federally chartered, federally insured banks. *See* 539 U.S. at 9-11.[2]

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[2] The Court has also held that state-law claims seeking ejectment based on Native American title are completely preempted. *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677-678 (1974), *cited in Caterpillar*, 482 U.S. at 393 n.8. This holding was based not on a statute but on "the special historical relationship between Indian tribes and the Federal Government." *Anderson*, 539 U.S. at 8 n.4.

The provision of the NBA at issue in *Anderson* was section 30, now codified at 12 U.S.C. §§ 85-86. Section 85 "sets forth the substantive limits on the rates of interest that national banks may charge," while § 86 "sets forth the elements of a usury claim against a national bank ... and prescribes the remedies available to borrowers who are charged higher rates." *Anderson*, 539 U.S. at 9. Under § 85, a national bank may charge—on a loan issued to a borrower anywhere in the country—up to the higher of two interest rates: 1) the maximum rate permitted for any lender by the law of the bank's home state (or 7 percent if no rate is provided by that law), and 2) one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the national bank's home district. *See* 12 U.S.C. § 85; *see also* 12 C.F.R. § 7.4001(b) ("A national bank located in a state may charge interest at the maximum rate permitted to any ... lending institution by the law of that state."); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (national banks may "export" their home-state interest rates, applying them to loans made to out-of-state borrowers).[3]

In finding complete preemption under the NBA, this Court clarified that the "dispositive question" for complete-preemption analysis is whether Congress intended a federal cause of action to be exclusive. *Anderson*, 539 U.S. at 9; *see also id.* at 9 n.5 ("[T]he proper

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[3] National banks' authority to charge the highest rate allowed for any lender by the law of their home states is commonly referred to as "most favored lender" status. *See, e.g.*, *Marquette*, 439 U.S. at 314 & n.26 (citing *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874)).

inquiry focuses on whether Congress intended the federal cause of action to be exclusive."). As to the NBA, the Court found that question answered by decisions, stretching back over a century, that had deemed the cause of action in § 86 to be exclusive. *See id.* at 10 (citing, among others, *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 32-33 (1875); *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 114 (1919)).

2. In the late 1970s, interest rates soared to record levels. *See, e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 845 (1996) (plurality opinion); 28 U.S.C. § 1961 note (showing changes in the 52-week T-bill rate through the period). The high rates gave national banks a competitive advantage over their state-chartered counterparts, because "state lending institutions were constrained in the interest they could charge by state usury laws." *Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992) (citing *Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988)). "National banks did not share this inhibition because they could charge whatever interest rates were allowed under ... [National] Bank Act § 85." *Greenwood Trust*, 971 F.2d at 826.

Congress sought to rectify this inequality in 1980 when it enacted the Depository Institutions Deregulation and Monetary Control Act (DIDA), Pub. L. No. 96-221, 94 Stat. 132. Section 521 of DIDA—the opening clause of which confirms Congress's intent "to prevent discrimination against State-chartered insured depository institutions ... with respect to interest rates," 12 U.S.C. § 1831d(a)—amended the Federal Deposit Insurance Act so as to establish limits on the interest federally insured state banks may charge, and to provide a federal cause of action against banks that ignore those limits. *See* 94 Stat. at 164-165 (codified at 12 U.S.C.

§ 1831d). Under § 1831d(a), which explicitly preempts contrary state laws, state banks may charge up to the higher of two interest rates: 1) the maximum rate permitted for any lender by the law of the bank's home state, and 2) one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the state bank's home district. *See* 12 U.S.C. § 1831d(a); *see also "Most Favored Lender" Doctrine Applies To Insured State Banks*, FDIC Advisory Op. 81-3 (Feb. 3, 1981), *available at* http://www.fdic.gov/regulations/laws/rules/4000-730.html.[4]

As several circuits have recognized (including the Eighth Circuit), the language of § 1831d is "substantially identical" to that of 12 U.S.C. §§ 85-86, the NBA provisions underlying this Court's complete-preemption decision in *Anderson*. *Discover Bank* v. *Vaden*, 489 F.3d 594, 605 n.14 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009); *accord, e.g.*, *Mamot Feed Lot & Trucking* v. *Hobson*, 539 F.3d 898, 903 n.4 (8th Cir. 2008); *In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005); *Gavey Props.*, 845 F.2d at 521. "The parallelism was not mere happenstance. To the exact contrary, Congress made a conscious choice to incorporate the [National] Bank Act standard into DIDA." *Greenwood Trust*, 971 F.2d at 827 (citing 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor)). In fact, "Congress transplanted verbatim in section 521 [of DIDA] substantive language from section 85 ... with the explicit purpose of providing state-

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[4] DIDA gave States the right to opt out of the preemption effected by § 1831d. *See* DIDA § 525, 94 Stat. at 167 (codified at 12 U.S.C. §§ 1730g note (repealed), 1785 note, 1831d note).

chartered banks with authority identical to that enjoyed by national banks under section 85." *12 U.S.C. § 1831d Preempts Contrary State Common Law Restrictions On Credit Card Loans*, FDIC Advisory Op. 93-27 (July 12, 1993), *available at* http://www.fdic.gov/regulations/laws/rules/4000-8160.html; *see also* 126 Cong. Rec. 6,900 (1980) (statement of Sen. Proxmire) (Under DIDA, "State chartered depository institutions are given the benefits of 12 U.S.C. § 85.").

3. Respondents are Missouri homeowners who obtained second-mortgage loans from FirstPlus Bank, a California-chartered, federally insured bank that has since gone bankrupt. App. 2a-3a. Petitioners are entities that subsequently purchased or assumed some of respondents' and/or other FirstPlus loans. App. 3a. In 2004, respondents filed a putative class action against petitioners in Missouri state court, alleging that FirstPlus charged them fees, in connection with the origination of their loans, that violated the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-408.241. App. 3a. More specifically, respondents' state-court petition (the Missouri equivalent of a complaint) alleged (¶ 67) that the Thomas respondents were charged, among other fees, "a 10% origination fee" that Missouri law did not permit. Among other remedies, respondents sought "the return of all interest charged ... on any of these Second Mortgage Loans." *Id.* at 49 (Prayer for Relief).

Petitioners removed the case to federal court on the ground that DIDA completely preempted respondents' claims and hence they arose under federal law, giving the district court original jurisdiction under 28 U.S.C. § 1331. *See* App. 4a. Petitioners "relied primarily upon th[is] ... Court's decision in *Beneficial National Bank* v. *Anderson*, ... alleg[ing that] the similar-

ity in language between DIDA and the NBA compelled the conclusion that DIDA, like the NBA, created the exclusive federal remedy for usury claims against federally-insured, state-chartered banks." *Id.*

Following removal, respondents filed an amended petition that reiterated the allegation regarding the origination fee paid by the Thomas respondents and further alleged (¶ 72) that respondent Rich was illegally charged "an 8.5% origination fee." Respondents also moved for a remand to state court, asserting that DIDA did not completely preempt their claims, in part because the claims were based not on the periodic interest rates they were charged but on the origination fees and certain other fees imposed in connection with the loans. App. 4a, 15a, 16a.

The district court denied respondents' motion to remand, agreeing with petitioners that DIDA "'completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge.'" App. 16a (quoting *In re Community Bank*, 418 F.3d at 295). The court specifically rejected respondents' attempt to distinguish periodic interest rates from loan fees, relying on a then-recent Eighth Circuit decision, *Phipps* v. *FDIC*, 417 F.3d 1006 (8th Cir. 2005), that had held such a distinction untenable. *See* App. 16a. The *Phipps* court, in turn, had based its holding on: 1) a regulation issued by the Comptroller of the Currency that broadly construes the term "interest" under the NBA to encompass numerous types of fees, *see* 12 C.F.R. § 7.4001(a); and 2) *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), in which this Court deferred to that broad definition, deeming it reasonable and thus entitled to deference, *see id.* at 740-745; *Phipps*, 417 F.3d at 1011-1012.

After concluding that it had jurisdiction by virtue of complete preemption, the district court granted petitioners' motion to dismiss the complaint on substantive preemption grounds. *See* App. 19a-20a. Respondents moved for reconsideration but the district court declined to reconsider, noting that since its order denying remand, a second court of appeals had concluded that DIDA completely preempts state-law usury claims against federally insured state banks. *See* App. 22a (citing *Discover Bank*, 489 F.3d 594).

4. The Eighth Circuit reversed. *See* App. 1a-13a. In its view, "the language of DIDA, unlike the NBA, does not reflect Congress' intent to provide the exclusive cause of action for a usury claim against a federally-insured state-chartered bank." App. 6a. In particular, the court observed that both the substantive and remedial provisions in § 1831d indicate that they apply only "if the applicable rate prescribed in [§ 1831d(a)] exceeds the rate [a] State bank ... would be permitted to charge in the absence of" that subsection. 12 U.S.C. § 1831d(a), (b), *quoted in* App. 7a. According to the court of appeals, this language "clearly indicates the limited nature of the federal statute's preemption of state law." App. 8a. Such a "limited nature," the court reasoned, precluded the conclusion that Congress intended the cause of action in § 1831d(b) to be exclusive, i.e., precluded the conclusion that any state-law claims were completely preempted. *See* App. 10a-11a.

The court of appeals acknowledged that "other federal courts have interpreted the language in § 1831d differently." App. 11a (citing *Discover Bank*, 489 F.3d 594). The court contended, however, that these courts had failed to consider "the unabridged language of the statute." App. 12a. The court did not address how its own conclusion could be squared with Congress's in-

tent—revealed both in "the unabridged language of the statute" and in the legislative history—to put national and state banks on an equal footing "with respect to interest rates," 12 U.S.C. § 1831d(a).

The Eighth Circuit also ruled that by its terms § 1831d does not apply in this case because the maximum periodic percentage interest rate that Missouri law allowed for each of the loans at issue was either 20.04% or unlimited (depending on the timing of the particular loan), "well in excess of the rate allowed by DIDA." App. 10a (citing Mo. Rev. Stat. § 408.232(1)). The court did not explain this conclusion, and in particular never stated what "the rate allowed by DIDA" was. More importantly, although respondents had, as noted, argued that their claims were based on loan fees rather than periodic interest rates, the Eighth Circuit did not—as required by this Court's holding in *Smiley* that "interest" for these purposes includes various loan fees—compare the fees that Missouri law permitted on the loans at issue with the fees allowed under DIDA, i.e., the fees allowed by the law of California, FirstPlus Bank's home state.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision creates an acknowledged conflict in the circuits on whether section 521 of DIDA, 12 U.S.C. § 1831d, completely preempts state-law usury claims against state-chartered, federally insured banks. That question is important and recurring, and given the integrated banking system that prevails nationwide it is one on which a uniform answer is essential. Moreover, the Eighth Circuit's answer to the question is wrong. This Court's review is therefore warranted. Review is also warranted of the second question presented, because the court of appeals' ruling

that DIDA does not apply here conflicts with *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). There, this Court held—deferring to the Comptroller of the Currency's statutory interpretation—that many loan fees constitute "interest" under 12 U.S.C. § 85. *See* 517 U.S. at 740, 744-745. Yet here the Eighth Circuit ignored fees, looking only to periodic percentage interest rates in concluding that the "interest" allowed on the loans to respondents was greater under Missouri law than under DIDA.

I. THE EIGHTH CIRCUIT'S COMPLETE-PREEMPTION HOLDING IS WRONG AND CREATES A CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

A. The Decision Below Conflicts With Decisions Of The Third And Fourth Circuits

The court of appeals held here that section 521 of DIDA, 12 U.S.C. § 1831d, does not completely preempt state-law usury claims against federally insured state banks. *See* App. 10a-11a. As the court itself recognized, "other federal courts have interpreted the language in § 1831d differently." App. 11a. Specifically, in *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005), the Third Circuit held that "§ 521 of DIDA completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge," *id.* at 295 (footnote omitted). The Fourth Circuit later reached the same conclusion. *See Discover Bank* v. *Vaden*, 489 F.3d 594, 605-606 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009). And the Ninth Circuit has suggested that it too shares this view, though without actually deciding the issue. *See Cross-Country Bank* v. *Klussman*, 74 F. App'x 796, 797 (9th Cir. 2003)

("[I]t appears that the rationale of the Supreme Court's decision in *Anderson* would extend to usury claims against state chartered, federally insured banks.").[5]

In finding complete preemption under DIDA, the Third and Fourth Circuits both invoked this Court's holding that section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, completely preempts state-law usury claims against national banks. *See Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9-11 (2003), *cited in In re Community Bank*, 418 F.3d at 294-295, and *Discover Bank*, 489 F.3d at 604-605. Each circuit then noted that Congress drew the relevant language in DIDA from that section of the NBA, and each circuit thus applied the principle, repeatedly enunciated by this Court, that "[w]hen Congress borrows language from one statute and incorporates it in another statute, the language of the two acts ordinarily should be interpreted the same way." *In re Community Bank*, 418 F.3d at 295-296 (citing, among others, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)), *quoted in Discover Bank*, 489 F.3d at 605. The Fourth Circuit also drew support for its holding from an amicus brief filed with the court by the FDIC—the agency that regulates federally insured state banks, *see* 12 U.S.C. § 1813(q)(3)—a brief that argued for complete preemption on the strength of *Anderson* after noting that "[t]he agency has 'uniformly construed Section 1831d in pari materia

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[5] District courts have likewise divided on the issue. *Compare, e.g., Forness* v. *Cross Country Bank, Inc.*, No. 05-cv-417, 2006 WL 240535, at *3 (S.D. Ill. Jan. 13, 2006), *and Hill* v. *Chemical Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992) (each finding complete preemption), *with Saxton* v. *Capital One Bank*, 392 F. Supp. 2d 772, 784 (S.D. Miss. 2005), *and Partin* v. *Cableview, Inc.*, 948 F. Supp. 1046, 1049 & n.4 (S.D. Ala. 1996) (each holding the opposite).

with Sections 85 and 86.'" *Discover Bank*, 489 F.3d at 606 (quoting Brief of Amicus Curiae Federal Deposit Insurance Corporation at the Request of the Court, at 10, *Discover Bank* (No. 06-1221), *available at* 2007 WL 551361 (hereafter FDIC Amicus Br.)).

In addition to directly conflicting with these other circuit decisions, the Eighth Circuit's interpretation of DIDA is in tension with decisions of two other circuits (and with several of its own prior cases) likewise recognizing, in other contexts, that 12 U.S.C. § 1831d should be construed identically with §§ 85-86 because it was patterned after those sections and intended to have the same meaning. *See Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) ("The historical record clearly requires a court to read the parallel provisions of DIDA and the [National] Bank Act *in pari materia*."); *Gavey Props./762* v. *First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (identical interpretation of the two statutes "virtually compelled" "[g]iven the similarity of language"); *Mamot Feed Lot & Trucking* v. *Hobson*, 539 F.3d 898, 903 n.4 (8th Cir. 2008) ("Courts construe the parallel provisions of § 85 and § 1831d similarly, as § 1831d was modeled after § 85."); *Venture Props., Inc.* v. *First S. Bank*, 79 F.3d 90, 91 (8th Cir. 1996) (citing *Greenwood Trust* for the proposition that "12 U.S.C. § 1831d parallels 12 U.S.C. § 85 and should be interpreted the same way"). Had the court of appeals adopted the same approach here—an approach that this Court's decisions direct, *see supra* p.14; *infra* pp.17-18—it necessarily would have reached the opposite conclusion regarding complete preemption, given this Court's holding that section 30 of the NBA completely preempts state-law usury claims against national banks, *see Anderson*, 539 U.S. at 9-11.

B. The Question Presented Is Recurring And Important

This Court's resolution of the circuit conflict created by the Eighth Circuit's decision is warranted. The divisions at both the circuit and district court levels, *see supra* pp.13-14 & n.5, demonstrate that the question presented is a recurring one. And prompt resolution of that question is important—just as it was with the analogous question under the NBA, which this Court took up as soon as a circuit conflict developed, *see Anderson*, 539 U.S. at 5-6 (noting that the court of appeals decision in that case conflicted with the holding of one other circuit).

A definitive answer to the question presented is needed because the disuniformity and uncertainty created by the circuit conflict are inimical to state banks, and to the secondary markets in which state banks may sell loans after origination. As this Court has observed, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that need[s] protection from 'possible unfriendly State legislation.'" *Anderson*, 539 U.S. at 10 (quoting *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)); *see also Talbott* v. *Board of Comm'rs*, 139 U.S. 438, 443 (1891) (federal law evinces "an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits"); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-316 (1978) (similar). Federally insured state banks are no less a part of that integrated nationwide banking system than national banks; hence, the importance of uniformity regarding their liability is just as great. Likewise, state banks, particularly when en-

gaged in interstate lending, also need protection from "possible unfriendly State legislation." Indeed, Congress's purpose in adopting § 1831d was to ensure that state banks did not suffer a competitive disadvantage because of provisions of state law from which Congress had already shielded national banks. *See supra* pp.7-8. Finally, because many loans are between banks and borrowers located in different States, disuniformity in the law can "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984).[6]

C. The Court Of Appeals' Holding Is Wrong

The court of appeals erred in concluding that § 1831d does not completely preempt state-law usury claims against federally insured state banks. This Court has repeatedly made clear that similar language in different statutes should be given the same meaning. *See, e.g., Northcross* v. *Board of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language in [two statutes] is, of course, a strong indication that the two statutes should be interpreted *pari passu*."), *cited in Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005); *see also In re Community Bank*, 418 F.3d at 296 (citing several decisions from this Court). That principle is relevant here because Con-

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[6] The need for uniformity also underlay this Court's finding of complete preemption in the labor-management and ERISA contexts. *See Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210 (1985) ("[T]he subject matter of [LMRA] § 301(a) is peculiarly one that calls for uniform law." (first alteration in original) (internal quotation marks omitted)); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988) (similar); *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

gress consciously drew the text of § 1831d from section 30 of the National Bank Act, 12 U.S.C. §§ 85-86. *See supra* pp.8-9. And this Court held in *Anderson* that those provisions of the NBA completely preempt state-law usury claims against national banks. *See* 539 U.S. at 9-11. The parallel language in § 1831d should thus likewise be construed to completely preempt state-law usury claims.

Indeed, the argument for complete preemption is even stronger here than it was in *Anderson*, because of a second rule of statutory interpretation. That rule states that Congress's inclusion of pre-existing language in a statute is presumed to incorporate any settled judicial construction of that language. *See, e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)); *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998). Thus, whereas the canon just discussed directs courts to construe two statutes in parallel but does not indicate what the proper construction is, this canon directs courts to embrace a specific construction—namely the one that Congress, at least implicitly, has endorsed. And by the time of DIDA's passage in 1980, it had been settled for decades that the language in section 30 of the NBA (12 U.S.C. §§ 85-86) reveals a congressional intent to create an exclusive cause of action for usury claims against national banks. *See Anderson*, 539 U.S. at 10 (citing, among others, *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 32-33 (1875); *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 114 (1919)). Congress's application of essentially the same language to state banks in § 1831d compels the conclusion that it intended the cause of action in that section to be exclu-

sive as well. That congressional intent is "dispositive" as to complete preemption. *Anderson*, 539 U.S. at 9.

The Eighth Circuit reached the opposite conclusion on the ground that both the substantive and remedial provisions in § 1831d include the phrase "if the applicable rate prescribed in [§ 1831d(a)] exceeds the rate [a] State bank ... would be permitted to charge in the absence of" that subsection. 12 U.S.C. § 1831d(a), (b); *see* App. 7a-9a. In the court's view, this phrase indicates Congress's desire to limit the reach of the cause of action in § 1831d(b), thus precluding a finding of complete preemption. *See* App. 10a-11a. That reasoning is flawed; the "niggling variation[]" between the two statutes identified by the court of appeals, *Greenwood Trust*, 971 F.2d at 827 n.7, does not justify its disregard of their overall "striking" similarity, *id.* at 826 n.7.

The relevant portions of both DIDA and the NBA serve the same purpose: to shield federally insured state and national banks, respectively, from the limits imposed by state usury laws. Each statute, moreover, accomplishes that goal in the same way: by giving banks the authority to charge a federally prescribed rate, namely (in both statutes) the higher of "the rate allowed by the laws of the State ... where the bank is located" and "1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where" the bank is located. 12 U.S.C. §§ 85, 1831d(a). And each statute creates a federal cause of action, with the same limitations period and the same prescribed damages, against banks that exceed that federally authorized maximum. *See id.* §§ 86, 1831d(b). The "if" clause on which the Eighth Circuit focused is insignificant: It merely recognizes that if the DIDA rate is no higher than what state law authorizes, the protection

the statute grants is unnecessary, as the bank can simply charge the state rates. *See Gavey Props.*, 845 F.2d at 522 (rejecting an argument like the Eighth Circuit's on the ground that the "conditional clause ... can be seen as simply providing a more exacting formulation than § 85 of Congress's intent to aid federally insured financial institutions").[7]

There is additional evidence, moreover, that Congress, unlike the Eighth Circuit, sees no substantive difference between the language in §§ 85-86 and the language in § 1831d. DIDA included two other provisions virtually identical to section 521 (i.e., § 1831d), the first of which applied to federally insured savings and loan associations (section 522) and the second of which applied to insured credit unions (section 523). Like section 521, both of these other sections included the "if" clauses on which the Eighth Circuit placed dispositive weight here. *See* DIDA § 522, 94 Stat. at 165 (codified until 1989 at 12 U.S.C. § 1730g); *id.* § 523, 94 Stat. at 166 (codified at 12 U.S.C. § 1785(g)). In 1989, Congress repealed the statutory section containing the savings and loan provision, and re-enacted that provision elsewhere. *See* Financial Institutions Reform, Recovery, and Enforcement Act § 407, Pub. L. No. 101-73, 103 Stat. 183, 363 (repealing § 1730g); *id.* § 301, 103 Stat. at 277, 282 (re-enacting the language). The re-enacted section omits the "if" clause from the substantive provision, instead using the phrasing in the NBA, i.e., in 12 U.S.C. § 85. *See* 12 U.S.C. § 1463(g)(1). The language

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[7] *Gavey Properties* involved section 522 of DIDA, which, as discussed immediately below, applied to federally insured savings and loan associations but used the same language as section 521. *See* 94 Stat. at 165 (codified until 1989 as 12 U.S.C. § 1730g).

of the re-enacted remedial provision is also closer to its NBA counterpart than the original version. Yet the legislative history of FIRREA states explicitly that the re-enactment was not intended to effect a substantive change. *See* H.R. Rep. No. 101-54, at 343 (1989) ("The effect of this section is to preserve the current preemption of state usury laws."). Congress thus evidently does not view the inclusion or omission of the "if" clause on which the Eighth Circuit focused as altering the extent to which state usury laws are preempted.

Further confirming the infirmity of the Eighth Circuit's interpretation is the fact that that interpretation fails to give effect to Congress's manifest purpose in adopting DIDA. *See Discover Bank*, 489 F.3d at 604 (construing DIDA in light of "the purpose underlying [its] enactment"). *See generally, e.g., Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory interpretation includes "considering the purpose and context of the statute"). As the statutory text states—in language the Eighth Circuit never discussed—Congress passed section 521 "to prevent discrimination against State-chartered insured depository institutions ... with respect to interest rates." 12 U.S.C. § 1831d(a). Congress's explicit objective, in other words, was to provide federally insured state banks with the same privileges and protections, in terms of interest rates and usury laws, enjoyed by national banks. *See* FDIC Amicus Br. 10 ("Congress patterned Section 1831d after Sections 85 and 86, used similar language in both statutes, provided comparable remedies, and expressed its intent to provide state banks parity with national banks."). The legislative history confirms this intent. *See supra* pp.8-9; *cf. Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65-66 (1987) (relying on the legislative history of ERISA section 502 in holding that that sec-

tion completely preempts state-law claims). In fact, the conference report accompanying DIDA directly contradicts the Eighth Circuit's view that DIDA's preemptive effect is more limited than the NBA's, stating that "[s]tate usury ceilings on all loans made by Federally insured depository institutions ... will be permanently preempted." H.R. Conf. Rep. No. 96-842, at 78 (1980) *reprinted in* 1980 U.S.C.C.A.N. 298, 308. Recognizing that the cause of action for usury is necessarily federal, and therefore removable, is a critical part of the protection that Congress sought to provide, just as it was with national banks and the NBA. The Eighth Circuit's decision here wrongly denies that protection to federally insured state banks.[8]

Finally, even if the Eighth Circuit's reading of the statutory language were correct, the court's conclusion that DIDA does not completely preempt any state-law claims would not follow. The court's interpretation was that "the remedy set forth in § 1831d(b) only applies in limited circumstances." App. 10a. But that does not warrant a holding that the remedy is not exclusive in those "limited circumstances," i.e., when it *does* apply. As this Court has repeatedly explained, complete preemption means that putative state-law claims are actually federal claims if they fall within the scope of an exclusive federal cause of action—whatever that scope may be. *See Anderson*, 539 U.S. at 8 ("When the federal statute completely pre-empts the state-law cause

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[8] The court of appeals also saw great significance in the fact that § 1831d(a) states that it preempts state law "for the purposes of this section." *See* App. 7a-8a. It is unclear, however, how this language substantively distinguishes DIDA from the NBA, and specifically what additional "purposes" the Eighth Circuit thought could be served by the complete preemption effected by the NBA.

of action, a claim which comes within the scope of that cause of action ... is in reality based on federal law."); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 (1983) (similar). The Eighth Circuit's view that the scope of § 1831d(b) is narrower than petitioners contend (and other courts have found) simply does not lead to, or in any way support, the conclusion that even claims falling within that narrower scope avoid being completely preempted. What Congress intended a federal cause of action's scope to be, and whether it intended that cause of action to be exclusive, are two distinct inquiries.

The court of appeals' flawed analysis appears to have been driven by the assumption that complete preemption could be found only if Congress intended § 1831d to preclude all state-law usury claims. But that assumption is unwarranted (although, as explained, the language and history of DIDA establish that Congress did so intend). Again, the question is simply whether Congress intended a cause of action to be exclusive of state-law claims falling within its scope. Indeed, if the Eighth Circuit's reasoning were sound, then this Court should not have (unanimously) found complete preemption in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), because section 301 of the LMRA does not completely preempt *all* state-law claims between unions and employers, but only "claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987) (quoting *International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 859 n.3 (1987)); *see also Caterpillar*, 482 U.S. at 396 n.10 (similar); *Livadas* v. *Bradshaw*, 512 U.S. 107, 122 n.16 (1994). Likewise, under the Eighth Circuit's analysis

this Court's unanimous decision in *Metropolitan Life Insurance* was wrong, because ERISA does not "pre-empt entirely every state cause of action relating to [ERISA] plans," *Franchise Tax Bd.*, 463 U.S. at 25, but only those that fall "within the scope of § 502(a)," *Metropolitan Life Ins.*, 481 U.S. at 64.

In sum, because the decision below is wrong and creates a circuit conflict on an important and recurring issue of federal law, this Court's review is warranted.

II. THE EIGHTH CIRCUIT'S HOLDING THAT DIDA DOES NOT APPLY TO THE LOANS AT ISSUE HERE RESTS ON A DEFINITION OF "INTEREST" THAT CONFLICTS WITH THIS COURT'S DECISION IN *SMILEY*

The court of appeals committed a second, closely related error in this case. It held that section 521 of DIDA by its terms does not even apply to the loans at issue here because "the interest rate allowed by Missouri law for second mortgages was either as high as 20.[0]4% or unlimited at all applicable times, well in excess of the rate allowed by DIDA." App. 10a (emphasis omitted) (citing Mo. Rev. Stat. § 408.232(1)). That statement—which was the entirety of this part of the Eighth Circuit's analysis—addresses only periodic percentage interest rates. Under § 1831d, however, the term "interest" encompasses many types of fees, not simply periodic rates. The Comptroller of the Currency has interpreted "interest" under 12 U.S.C. § 85 to mean "any payment compensating a creditor or prospective creditor for an extension of credit," even if the payment is a flat fee or otherwise not calculated as a function of time. 12 C.F.R. § 7.4001(a). In *Smiley* v. *Citibank (S.D.), N.A.*, this Court rejected a challenge to that interpretation, deeming it reasonable and hence entitled to judicial deference. *See* 517 U.S. at 741-742 ("[I]t

seems to us quite possible and rational to distinguish, as the regulation does, between those charges that are specifically assigned to [certain] expenses and those that are assessed for simply making the loan." (emphasis omitted)). And the FDIC has since adopted the same interpretation of "interest" in § 1831d. *See General Counsel's Op. No. 10: Interest Charges Under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258, 19,259 (Apr. 17, 1998).

Because the threshold question under § 1831d is whether the "interest" allowed by DIDA—namely the higher of the applicable 90-day discount rate and the interest allowed by the law of the originating bank's home state—is in any instance higher than what would be allowed absent DIDA, *Smiley* required the Eighth Circuit to compare the loan fees permitted by DIDA (i.e., the fees allowed by the law of California, FirstPlus Bank's home state) to the fees permitted by Missouri law, as well as comparing the periodic interest rates. Indeed, a comparison of fees was particularly appropriate here because respondents, as discussed, stressed in their briefing below that their claims against petitioners were based solely on such fees, particularly origination fees. *See* Resps.' C.A. Br. 6 ("Plaintiffs' MSMLA claims are *not* based on allegations that the interest rates they were charged exceeded the rate permitted under [Mo. Rev. Stat.] section 408.232.1 .... Instead, Plaintiffs' claims are based entirely on allegations that they were charged unauthorized and excessive loan fees ...."); *see also supra* pp.9-10 (describing respondents' allegations). In failing to compare the permissible fees, the Eighth Circuit departed from *Smiley*.

The fees comparison mandated by *Smiley* makes clear that DIDA does govern here. As the Eighth Circuit itself noted, *see* App. 3a n.1, Missouri law places

several limits on the fees, including origination fees, that can be charged in connection with second mortgages, *see* Mo. Rev. Stat. § 408.233(1); *Adkison* v. *First Plus Bank*, 143 S.W.3d 29, 30 (Mo. Ct. App. 2004) (per curiam); *see also* App. 3a n.1 ("The limits on closing costs and fees provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher [periodic] interest rate on second mortgage loans."). By contrast, California law, applicable under DIDA because the originator of the loans to respondents was a California-chartered bank, *see* App. 2a, imposes no such limits. Hence, DIDA applies here because the fees—and thus the "interest" as that term is used in DIDA—that could be charged to respondents under California law exceeds the fees (i.e., "interest") that could be charged under Missouri law.[9]

The Eighth Circuit itself reached a comparable conclusion in *Phipps* v. *FDIC*, 417 F.3d 1006 (8th Cir. 2005), in which the court correctly applied *Smiley* to a case that arose under the NBA but was otherwise quite similar to this action. In *Phipps*, as here, the plaintiffs sought to avoid complete preemption of their MSMLA

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[9] Although not all loan fees constitute interest under *Smiley*, the origination fees on which respondents' claims are partly based do so: An interpretive letter from the Office of the Comptroller of the Currency (OCC) states that a fee to open a home-equity line of credit constitutes interest because it is not "'specifically assigned'" to cover the cost of an activity or service. *Whether Certain Fees Levied By A Bank In Connection With Home Equity Loans Constitute Interest Under 12 U.S.C. 85 And 12 C.F.R. 7.40001(a)*, OCC Interpretive Letter No. 803 (Oct. 7, 1997), *available at* 1998 WL 320183, at *2-3 (quoting *Smiley*, 517 U.S. at 741-742). The same is true of loan-origination fees—a direct analogue to a line-of-credit opening fee—as the Eighth Circuit itself has previously recognized, *see Phipps* v. *FDIC*, 417 F.3d 1006, 1012 (8th Cir. 2005) (origination fees are "[c]learly" interest).

usury claims by "strenuously argu[ing] their claims are based on unlawful *fees* charged, not unlawful *interest*." *Id.* at 1009. Noting that it was "required to look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction," *id.* at 1011, and citing its own precedent as well as cases from several other circuits that had conducted a similar analysis, *see id.* at 1012, the court of appeals deemed the fees at issue to be "interest" under *Smiley* and therefore held the plaintiffs' claims completely preempted under *Anderson*, *see id.* at 1011-1012.

In short, the decision below conflicts with this Court's decision in *Smiley*. Moreover, petitioners alerted the court of appeals about this conflict in requesting rehearing, yet the court declined the request. Under these circumstances—and particularly given the close link between the Eighth Circuit's departure from *Smiley* and its ruling on the complete-preemption issue—this Court's review of the second question presented is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3302

DEANTHONY THOMAS; SUSAN JELINKE-THOMAS;
STEVEN M. RICH,
Appellants,

v.

US BANK NATIONAL ASSOCIATION ND; ACE SECURITIES CORP. HOME LOAN TRUST 1999-A ASSET BACKED NOTES, SERIES 1999-AA; U.S. BANK N.A.; WILMINGTON TRUST COMPANY; FIRSTPLUS HOME LOAN OWNER TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUST 1996-3; FIRSTPLUS HOME LOAN OWNER TRUST 1996-4; FIRSTPLUS HOME LOAN OWNER TRUST 1997-1; FIRSTPLUS HOME LOAN OWNER TRUST 1997-2; FIRSTPLUS HOME LOAN OWNER TRUST 1997-3; FIRSTPLUS HOME LOAN OWNER TRUST 1997-4; FIRSTPLUS HOME LOAN OWNER TRUST 1998-1; FIRSTPLUS HOME LOAN OWNER TRUST 1998-2; FIRSTPLUS HOME LOAN OWNER TRUST 1998-3; FIRSTPLUS HOME LOAN OWNER TRUST 1998-4; FIRSTPLUS HOME LOAN OWNER TRUST 1998-5; THE ASSOCIATES; CIT GROUP; CONTIMORTGAGE CORPORATION; GOLETA NATIONAL BANK; MASTER FINANCIAL; NORWEST HOME IMPROVEMENT, INC.; PSB LENDING; RESIDENTIAL FUNDING CORPORATION; HOUSEHOLD FINANCE CORPORATION; CHALLENGE REALTY; GERMAN AMERICAN CAPITAL CORPORATION; SOVEREIGN BANK; PAIN WEBBER REAL ESTATE SECURITIES INC.; UBS REAL ESTATE SECURITIES, INC.; COUNTRYWIDE

HOME LOANS, INC.; BANC ONE FINANCIAL SERVICES INC.; FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF PFF BANK; WESTERN INTERSTATE BANCORP,
Appellees,

Appeal from the United States Court District Court
for the Western District of Missouri
Argued: April 13, 2009
Decided: August 7, 2009

[575 F.3d 794]

* * *

[795]

Before: MURPHY, HANSEN, and BYE, Circuit Judges.

[796]

BYE, Circuit Judge.

Deanthony Thomas, Susan Jelinke-Thomas, and Steven M. Rich (collectively Thomas) brought claims in Missouri state court against a number of banks and lending institutions (collectively the lenders) alleging violations of the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-.241, arising out of loans originated by FirstPlus Bank (a California lending institution which is now defunct) and subsequently purchased by the lenders. The lenders removed the case to federal court arguing the state law claims were completely preempted by the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. § 1831d. Agreeing with the lenders, the district court denied Thomas's motion to remand to state court

and then dismissed the claims. Thomas now appeals. We reverse with instructions to remand this case to state court.

I

Thomas and the other appellants are Missouri homeowners who obtained "high loan-to-value" second mortgages (reflecting a total debt of 125% of the appraised value) on their homes from FirstPlus Bank. FirstPlus Bank was a federally insured, state-chartered bank when the loans were made. FirstPlus Bank became defunct, and the loans were purchased or assumed by other banks as assignees, including some national banks.

In June 2004, Thomas brought suit in Missouri state court on behalf of himself and others similarly situated against thirty-three assignee banks of FirstPlus alleging the loans they had received violated the MSMLA, which places limits on the type and amount of closing costs and fees a lender can charge on residential second mortgage loans secured by Missouri real estate.[1]

Specifically, Thomas alleged the subject loans violated Missouri law because: 1) the borrowers were

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[1] Missouri law allows lenders to charge a higher interest rate for second mortgage loans than the general usury rate applicable to most loans. *Compare* Mo. Rev. Stat. § 408.030.1 (generally allowing a rate of 10% or the market rate, whichever is higher) *with* Mo. Rev. Stat. § 408.232.1 (prior to 1998, setting a maximum rate of 20.04% on second mortgage loans, and setting ***no*** limit on second mortgage interest rates after 1998). The limits on closing costs and fees provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher interest rate on second mortgage loans.

charged nonrefundable finder's fees or broker's fees which were not allowed by or in excess of the fees allowed by the MSMLA; and 2) FirstPlus charged certain closing costs and fees on behalf of third parties which were in excess of the costs actually charged by those third parties and then retained the difference. Thomas sought to recover the interest paid on the allegedly unlawful second mortgage loans and an order barring the collection of additional interest. Notably, none of the subject loans violated Missouri law with respect to the maximum interest rate chargeable on a second mortgage loan, which exceeded the rate allowed by federal law pursuant to DIDA.

In August 2004, the defendant banks removed the case to federal district court. The banks alleged removal was proper because FirstPlus, the originator of the loans, was a federally-insured, state-chartered bank and DIDA (which applies to federally-insured, state-chartered banks) completely preempted the state law claims brought under the MSMLA. The banks relied primarily upon the Supreme Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), which held that the National Bank Act (NBA), 12 U.S.C. §§ 85-86, completely preempted state law usury **[797]** claims against national banks. *Id.* at 10-11. The banks alleged the similarity in language between DIDA and the NBA compelled the conclusion that DIDA, like the NBA, created the exclusive federal remedy for usury claims against federally-insured, state-chartered banks.

Thomas filed a motion to remand the case to state court. He argued the language of DIDA differed in material respects from the language in the NBA, and DIDA only preempted state usury laws in limited circumstances, that is, when the state laws set a lower al-

lowable interest rate than that allowed by federal law. Because Missouri law allowed a higher allowable interest rate than the rate set forth in DIDA, preemption was not triggered. The district court disagreed and denied the motion to remand, concluding DIDA provided the exclusive remedy for usury claims against federally-insured, state-chartered banks. Thereafter the banks brought a motion to dismiss the case, which the district court granted.

Thomas filed a timely appeal. On appeal, he renews his argument that DIDA differs in material respect from the language of the NBA, and preemption does not apply in circumstances where state law allows a higher interest rate than the interest rate set forth in DIDA. The banks renew their claim as to the statutory language in DIDA being the same as the NBA, and federal law completely preempts the state law claims brought here. The national bank defendants alternatively argue that the NBA should apply whether they are the originator of a loan or purchase a loan as an assignee, and therefore completely preempts the claims brought against them even if DIDA does not. Finally, some of the assignee banks argue the named plaintiffs lacked standing to sue them because none of the named plaintiffs (as opposed to unnamed class member plaintiffs) have loans that have been assigned to them.

II

The district court's denial of the motion to remand the case to state court is reviewed de novo, *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1004 (8th Cir. 2006), as is the district court's dismissal of the case, *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 824-25 (8th Cir. 2004).

A

The general rule is when a claim filed in state court alleges only state law claims, the existence of a federal defense, e.g., preemption, is not enough to support the removal of the case to federal court. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). An exception to this rule is when the preemptive force of a federal statute completely displaces state law and it is clear Congress meant the federal statute to be the exclusive cause of action for the type of claim asserted. *Beneficial Nat'l Bank*, 539 U.S. at 8. Complete preemption, as opposed to ordinary or conflict preemption, is rare, however, and only applies if the "federal statutes at issue provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Id.*

Complete preemption does not exist here because the language of DIDA, unlike the NBA, does not reflect Congress' intent to provide the exclusive cause of action for a usury claim against a federally-insured state-chartered bank. To the contrary, a close examination of the statutory language indicates Congress very clearly intended the preemptive scope of DIDA to be limited to particular circumstances.

Two provisions of DIDA are at issue—the subsection discussing the circum-[798]stances under which a federally-insured state-chartered bank may charge the interest rate allowed by federal law notwithstanding state law to the contrary, 12 U.S.C. § 1831d(a) (the substantive provision), and the subsection setting forth a consumer's remedy when a bank charges interest in excess of that allowed by DIDA, 12 U.S.C. § 1831d(b) (the remedy provision). The substantive provision is set forth as follows:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. § 1831d(a).

The plain language of the statute clearly indicates the interest rate allowed by federal law only comes into play "*if* the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection." *Id.* (emphasis added). In other words, when the interest rate allowed by state law exceeds the interest rate set forth in DIDA, the federal statute does not apply. The limited nature of the preemptive effect the federal statute has on state law is emphasized by the qualifying phrase added to the

statute's preemption language: "notwithstanding any State constitution or statute which is hereby preempted ***for the purposes of this section.***" *Id.* (emphasis added). In other words, conflicting state constitutions or statutes are not preempted for every and all purposes, but only for purposes of "this section."

The remedy provision is set forth as follows:

> If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest.

12 U.S.C. § 1831d(b).

This remedy provision, as does the substantive provision, clearly indicates the [799] limited nature of the federal statute's preemption of state law, by stating the federal remedy only applies "*[i]f* the rate prescribed in subsection (a) of this section exceeds the rate such

State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section." *Id.* The limited scope of preemption is emphasized by the subsection's phrase stating "and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section" which follows the conditional circumstances under which the statute applies, i.e., *if* the federal rate exceeds the rate allowed by state law. In other words, the plain language of the statute ties the preemptive effect it has on state law to the condition being met. By stating "and such state fixed rate is thereby preempted," the statute plainly indicates the state rate is only preempted "if" exceeded by the rate prescribed in the federal statute.

A similar statute was interpreted by this court in *Firstsouth, F.A. v. Lawson Square, Inc. (In re Lawson Square, Inc.)*, 816 F.2d 1236 (8th Cir. 1987), involving section 1730g(a) of DIDA, which applies to federally insured savings and loan associations rather than federally insured, state-chartered banks. The language of the two statutes is, however, identical. The holding in *Lawson Square* makes clear that when the federal preemption language does not "fit," state law applies. *See id.* at 1239.

In *Lawson Square*, the interest rate allowed by Arkansas law exceeded the applicable interest rate set forth in DIDA. The rate allowed by federal law under DIDA fluctuated between 9.72% and 10.22% at all applicable times, while the rate otherwise allowed by Arkansas state law fluctuated between 13.5% and 14%. *Id.* at 1238. Because the rate allowed by DIDA did ***not*** exceed the rate allowed by state law, the court correctly reasoned the federal statute did not apply:

> [W]e note immediately that the very first clause of Section [1730g(a)] reads as follows: "[i]f the applicable rate prescribed in this section exceeds the rate an insured institution ... would be permitted to charge in the absence of this section ...". The "applicable rate" referred to is the federal discount rate plus one per cent.; the rate that would be permitted in the absence of this section is the Arkansas Constitution's present limit of federal discount rate plus five per cent. Attempting to substitute these terms for the words which represent them produces a false statement, for in fact the "applicable rate" does not exceed the "permitted rate." That being the case, we need go no further in Section [1730g(a)]; *we know that it does not apply in this instance.*

Id. 1239-40 (emphasis added).

In this case, the interest rate allowed by Missouri law for second mortgages was either as high as 20.4% or *unlimited* at all applicable times, well in excess of the rate allowed by DIDA. *See* Mo. Rev. Stat. § 408.232.1 (setting a maximum rate of 20.04% on second mortgage loans prior to 1998, and setting ***no*** limit on second mortgage interest rates after 1998). As a result, the federal statute does not apply. And, more significantly, for complete preemption purposes, the remedy set forth in the federal statute does not apply. Complete preemption only applies when it is clear Congress meant for the federal statute to "provide[] the *exclusive* cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8 (emphasis added). By its plain and unambiguous language, the remedy set forth in § 1831d(b) only applies in limited circumstances, and those circumstances are when the federal rate exceeds the rate al-

lowed by state law. [800] Because such a circumstance was not present in this case, just as it was not present in *Lawson Square*, the federal remedy does not apply and therefore is not the exclusive remedy. Accordingly the district court erred when it denied Thomas's motion to remand this case to state court.

We note other federal courts have interpreted the language in § 1831d differently. In *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd on other grounds* 129 S.Ct. 1262 (March 9, 2009) (2009 WL578636), the Fourth Circuit held DIDA, like the NBA, completely preempts state usury claims against federally-insured, state-chartered banks. *Id.* at 605. In so holding, the Fourth Circuit quoted the relevant provisions of § 1831d(a) in the following manner:

> In order to prevent discrimination against State-chartered insured depository institutions ... with respect to interest rates ... such State bank[s] ... may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest ... at the rate allowed by the laws of the State ... where the bank is located.

Id. at 604.

Comparing this redacted version of the statute with the full version of the statute does reveal the language eliminated by the Fourth Circuit's second set of ellipsis (emphasized below) is critical to the substantive meaning of the statute:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, ***if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection***, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. § 1831d(a).

We will not alter the statutory language in such manner to support a conclusion as to DIDA completely preempting state law while providing the exclusive federal remedy for state usury claims against federally-insured, state-chartered banks. Rather, the unabridged language of the statute, which is both the starting and ending point of our analysis, *see Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 918 (8th Cir. 2008) (indicating that when "the plain language of the statute controls ... we need not con-

sider the parties' varying interpretations of legislative history"), clearly establishes the limited effect DIDA has on such claims.

B

Alternatively, the national banks argue the claims against them are completely preempted under sections 85 and 86 of the NBA. We disagree. The national banks did not originate the loans at issue, but rather are assignee banks who subsequently purchased the loans. As assign-[801]ees, they are subject to all the claims which could have been brought against the originator of the loan. *See* 15 U.S.C. § 1641(d) ("Any person who purchases or is otherwise assigned a [tainted] mortgage ... shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the [original lender]."). To hold otherwise would allow an originating bank to cleanse an otherwise illegal loan merely by assigning it to a national bank.

Finally, some of the defendant banks (non-holder banks) argue they are not purchasers or assignees of any FirstPlus Bank second mortgage loans subject to the MSMLA, and therefore the plaintiffs lack standing to bring the claims against them. We decline to address this issue, preferring it be raised in the first instance upon remand to state court.

III

The judgment of the district court is reversed and the case is remanded to the district court with instructions to reinstate the claims and remand the case to state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs contend their mortgage loans were tainted by practices by the lender that violate a Missouri statute in connection with various overcharges and fees. Defendants, assignees of the loan obligations of plaintiffs, removed the case to this court on the theory that federal law preempts certain claims of usurious practices by lenders. The lender in this case was FirstPlus Bank (FPB), a California lending institution, now in bankruptcy, which was subject to California laws governing interest.

The defendant assignees contend they are protected by federal law (Sections 85 and 86 of the National Banking Act—the NBA—12 U.S.C. §§ 85-86) which allegedly preempts use of Missouri law in these circumstances. An alternative theory of protection would be that FPB, by reason of federal deposit insurance, was also protected by preemption, under the De-

pository Institutions Deregulation and Monetary Control Act—DIDA—12 U.S.C. § 1831d. Plaintiffs challenge these theories and seek remand.

As an initial matter, I disagree with defendants regarding preemption by the NBA. They were not originators of the loans, but simply assignees. I have so ruled in similar circumstances, and granted a remand. Defendants are soundly invoking DIDA, however, because FPB was the originator of the loans, and the section cited above "completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (3rd Cir. 2005).[1]

In this case and in what appears to be a companion case plaintiffs' counsel has argued that there is no preemption because there is no challenge here to the interest charged by FPB. The Eighth Circuit has, however, recently determined that at least some of the claims should be characterized as complaining about excessive interest, broadly construed. *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005). That ruling has finality, in that the mandate was issued earlier this month.

When there are some claims of excessive interest, the whole case is removable, 417 F.3d at 1011. I do not find briefing by plaintiffs attempting to distinguish the adverse ruling of the district judge in *Phipps*, and to assert that if excessive interest was claimed there that

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[1] Whether defendants have standing to assert FPB's preemption rights is not questioned by plaintiffs, and I assume there is standing. Another issue not before me is the possibility that FPB violated California law, which is not the thrust of this litigation.

is not the situation here. Under the circumstances the motion to remand (doc. 69) must be denied. SO ORDERED.[2]

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 30, 2005
Kansas City, Missouri

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[2] I will deal with a renewed motion to dismiss on the briefing heretofore filed, but it must be noted that the *Phipps* case creates a dilemma for plaintiffs in saying that to the extent they may be challenging charges that are *not* interest they are not entitled to complain under the Missouri statute, and "have failed to state a claim under Missouri law for which relief may be granted." 417 F.3d at 1014.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

ORDER

Through one of the oddities of computerized record-keeping, a collection of complex motions in this litigation, dating back some three years, now emerges as unruled motions. They should have appeared periodically in computer reports, and, when six months old, have been listed overdue. They have now been called to my attention. One might wonder why plaintiffs' counsel did not make inquiry.

Further examination suggests the case has been abandoned, because Eighth Circuit law now establishes that the claims cannot proceed as alleged State law violations, and the basic issues have been preempted by

federal law.[1] See my short memorandum on this subject two years ago. Doc. 126.

Various issues are presented: Personal jurisdictional challenges (Docs. 52 and 61), lack of standing (Doc. 54), the Missouri statute of limitations (Doc. 63), a constitutional bar to retroactive legislation (Doc. 59) and, what seems most controlling, exemption or preemption (Doc. 57). Because preemption has been ruled in a comparable case, *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), it seems to justify removal and now dismissal. Plaintiffs cannot proceed on a theory of violation of Missouri statutes.

Rather than get bogged down in other issues that are moot questions by reason of preemption and *Phipps*, I grant the motion to dismiss on preemption grounds (Doc. 57) and deny all other motions (Docs. 52, 54, 59, 61 and 63) as moot.[2] SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 26, 2007
Kansas City, Missouri

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[1] To the extent the charges are *not* characterized as interest, and thus preempted, the *Phipps* case, infra, holds there is no violation of Missouri law. 417 F.3d at 1014.

[2] This includes defendants' request for fees, because this litigation is legally frivolous, at least after *Phipps*. If I am now moving too precipitously, because of an impending reporting date, a timely motion for reconsideration or for relief from an adverse judgment would be considered.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 04-cv-6098-HFS

DEANTHONY THOMAS, *et al.*,
Plaintiffs,

v.

U.S. BANK N.A. N.D., *et al.*,
Defendants.

ORDER

Pending is a motion to reconsider (Doc. 133) and a notice of joinder in defendants' opposition to the motion to reconsider (Doc. 136). The joinder notice is treated by the computer as a motion. To the extent leave of court is appropriate, Doc. 136 is hereby GRANTED.

Central to the reconsideration claim is the contention that the court has erroneously derived a complete preemption rule for federally insured state banks from a rule applicable only to national banks. It is contended that *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), is based on differently worded legislation relating to national banks. Plaintiffs rely on a "plain meaning" reading of the statute here involved, 12 U.S.C. § 1831d(a) and (b), and a district court decision from Mississippi. *DuBose v. Merchants and Farmers Bank*, 2006 WL 568714 (S.D. Miss. 2006). *See also Saxton v. Capitol One Bank*, 392 F. Supp. 2d 772 (S.D. Miss. 2005).

Plaintiffs acknowledge that they must overcome a contrary ruling by Judge Alsop in *Hill v. Chemical Bank*, 799 F. Supp. 951 (D. Minn. 1992). They contend only that it was inadequately reasoned; that is, not reading the words of the statute as they and the Mississippi judge do. They fail to acknowledge and discuss a Fourth Circuit case favorably citing *Hill* and reaching the same result. *Discover Bank v. Vaden*, 489 F.3d 594 (2007), *cert. granted*, 128 S. Ct. 1651 (2008). *Discover Bank* was cited in the brief in opposition but plaintiffs do not deal with it in the reply.*

Hill and *Discover Bank* are well reasoned and supported and consistent with my earlier preemption ruling. I believe they are sound and that the novel and weakly supported theory of plaintiffs does not justify changing my dispositive ruling. To the extent it is plausible it may be dealt with on appeal.

The motion to reconsider (Doc. 133) is therefore DENIED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

September 23, 2008
Kansas City, Missouri

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* The Third Circuit has also considered the language in question and finds complete preemption. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (2005).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3302

DEANTHONY THOMAS *et al.*,
Appellants,

v.

US BANK NATIONAL ASSOCIATION ND, *et al.*,
Appellees,

Mortgage Bankers Association, *et al.*,
Amici on behalf of Appellee

Appeal from U.S. District Court for the
Western District of Missouri—St. Joseph
(5:04-cv-06098-HFS)
Filed: November 24, 2009

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Wollman, Judge Gruender, and Judge Benton took no part in the consideration or decision of this matter.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX F

STATUTORY PROVISIONS

12 U.S.C. § 85—Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the county, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase,

discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sightdrafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 86—Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. § 1831d—State-chartered insured depository institutions and insured branches of foreign banks

(a) Interest rates. In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch

of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) Interest overcharge; forfeiture; interest payment recovery.

If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest.

Supreme Court, U.S.
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No. 09-1161

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION ND, ET AL.,
Petitioners,

v.

DEANTHONY THOMAS, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) permits state-chartered banks to charge interest at a prescribed rate, preempts contrary state law, and provides a federal remedy for usury. That remedy only applies, however, "if the rate prescribed [by DIDA] exceeds the rate such State bank . . . would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b).

Below, the plaintiffs argued that DIDA does not apply to the facts of this case for two reasons: (a) the rate prescribed by DIDA did not exceed the applicable rate under Missouri law and (b) the claims in this case are not state-law usury claims because they pertain only to certain non-interest fees.

1. Did the Eighth Circuit err in holding, as a threshold matter, that DIDA "does not apply" to the "particular circumstances" of this case?

2. If it applied to the "particular circumstances" of this case, would DIDA completely preempt the plaintiffs' state-law claims?

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INTRODUCTION

This case is an unsuitable vehicle to explore complete preemption under DIDA because the conduct alleged does not come within the scope of DIDA. This Court's first attempt to decide whether ERISA completely preempted state-law claims failed for the same reason. *See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 24-25 (1983). In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003), by contrast, the plaintiffs "unquestionably and unambiguously" alleged usury violations within the scope of the National Bank Act.

Petitioners acknowledge that the "threshold question" under DIDA is whether the interest rate prescribed by DIDA is higher than the state-law rate. Pet. 25. They also acknowledge that the decision below "held that [DIDA] by its terms does not even apply to the loans at issue here" because the state rate was "well in excess of the rate allowed by DIDA." Pet. 24. The petition does not challenge the Eighth Circuit's stated basis for reaching that conclusion. Instead, petitioners claim that the decision below erred by failing to regard the specific loan fees at issue in this case as "interest." But the Eighth Circuit did not analyze the nature of the fees because doing so would not have changed the outcome. In any event, this Court typically refrains from deciding issues not passed on by the court below.

Petitioners' factbound threshold argument also fails on its own terms. The specific loan fees at issue are not "interest" under the relevant regulatory guidance. Thus, DIDA is inapplicable for another reason, in addition to the one identified by the Eighth Circuit—namely, that respondents' claims are not state-law usury claims to begin with. Accordingly, certiorari should be denied.

STATEMENT

1. In the late 1990's, some subprime lenders began to underwrite "high loan-to-value" second mortgages—loans in which the total debt consisted of 125% of the value of the borrower's home. Among these lenders was FirstPlus Bank, a now-defunct California-chartered entity that sold securitized pools of its subprime second mortgages to investors. In the course of these transactions, FirstPlus collected certain charges from borrowers that were passed on to a marketing affiliate as finders' fees.

Respondents are three Missouri homeowners who obtained second mortgage loans originated by FirstPlus. In 2004, they sued petitioners—thirty-three assignees of FirstPlus that had purchased their loans—in Missouri state court. The complaint alleges that the loans violated the Missouri Second Mortgage Loans Act (MSMLA), Mo. Rev. Stat. §§ 408.231-408.241, which "places limits on the type and amount of closing costs and fees a lender can charge on residential second mortgage loans secured by Missouri real estate." App. 3a.

Specifically, respondents allege that FirstPlus had unlawfully charged borrowers "finder's fees or broker's fees," as well as other loan fees characterized by the Eighth Circuit as "closing costs and fees [charged] on behalf of third parties." App. 4a; *see* D. Ct. Doc. No. 1-4 at ¶¶ 15(e), 18, 84 (state-court complaint). The complaint disavowed any claim of usury and acknowledged that the rate of interest charged on the loans was lawful under Missouri law. *Id.* ¶ 2 ("[P]laintiffs make no claim that the illegal charges were interest or that the [loans] were usurious under any applicable law.").

2. Petitioners removed the case to federal district

court on the ground that respondents' claims were in fact state-law usury claims and therefore completely preempted by the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. § 1831d. DIDA allows state-chartered banks to charge a prescribed federal interest rate. That prescribed rate is "a rate of not more than 1 percent per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank . . . or . . . the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater." *Id.* § 1831d(a). DIDA provides a federal remedy for usury, but that remedy only applies "[i]f the rate prescribed in subsection (a) . . . exceeds the rate such State bank . . . would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b).

Respondents moved to remand the case to state court. They argued that DIDA only preempts state-law claims "when the state laws set a lower allowable interest rate than that allowed by federal law." App. 5a. Because Missouri allowed an equal or higher maximum interest rate than the prescribed rate under DIDA, they argued, "preemption was not triggered." *Id.* Respondents also explained that the case concerned only "illegal 'finder's fees' and other non-interest" charges and therefore did not "fall within the ambit of DIDA[,] which regulate[s] 'interest.'" D. Ct. Doc. 70 at 2 (remand motion); D. Ct. Doc. 93 at 1 (reply). The district court denied the motion to remand and granted petitioners' subsequent motion to dismiss on substantive preemption grounds. App. 15a-20a.

3. The Eighth Circuit reversed. The court did not reach the question of whether DIDA would completely preempt state-law usury claims that fall within its scope. Instead, the court held that, under the circumstances of

this case, DIDA did not apply to respondents' loans. App. 6a.

The court focused its analysis on the language of the conditional clauses found in the relevant substantive and remedial provisions of DIDA. *See* 12 U.S.C. §§ 1831d(a), (b) (providing that DIDA applies "if the rate prescribed [by DIDA] exceeds the rate [the bank] would be permitted to charge in the absence of [DIDA]"). The court explained that "complete preemption does not exist here" because "the preemptive scope of DIDA" is "limited to particular circumstances." App. 6a. Those "particular circumstances," the court explained, are circumstances in which the rate prescribed by DIDA "exceeds the rate" allowed by state law. App. 7a (quoting 12 U.S.C. § 1831d). By contrast, "when the interest rate allowed by state law exceeds the interest set forth in DIDA, the federal statute does not apply." *Id.* "In other words, the plain language of the statute ties the preemptive effect it has on state law to the condition being met." App. 9a.

"In this case," the court held, "the interest rate allowed by Missouri law for second mortgages was either as high as 20.[0]4% or unlimited at all applicable times, well in excess of the rate allowed by DIDA." App. 10a (citing Mo. Rev. Stat. § 408.232). "As a result, the federal statute does not apply. And more significantly for complete preemption purposes, the remedy set forth in the federal statute does not apply." *Id.* The Eighth Circuit remanded this case to the district court with instructions to remand the case to state court. App. 13a.

Petitioners sought rehearing and rehearing en banc. No judge called for a vote or requested a response, and the petition was denied. App. 23a; *see* CA8 I.O.P. 21.

REASONS FOR DENYING THE WRIT

I. This Case Is An Unsuitable Vehicle to Address Complete Preemption Under DIDA Because DIDA Does Not Apply to the Facts of this Case.

Petitioners ask this Court to grant certiorari to decide whether DIDA completely preempts state-law claims that fall within its scope. But this case does not present that question, and the decision below did not address it.

Rather, as the petition acknowledges, this case presents a case-specific "threshold question" concerning whether the plaintiffs' claims fall within DIDA at all. Pet. 25. That question turns on whether the interest rate prescribed by DIDA "exceeds the rate [the bank] would be permitted to charge in the absence of [DIDA]." 12 U.S.C. § 1831d(b). If the answer is no, the statute does not apply, and the question of complete preemption does not arise. The Eighth Circuit held that the answer, on the facts of this case, was no.

The Eighth Circuit held that DIDA does not apply to the loans at issue here because "the interest rate allowed by Missouri law for second mortgages was either as high as 20.[0]4% or unlimited at all applicable times, well in excess of the rate allowed by DIDA." App. 10a. The court explained that the remedy provided by DIDA "only applies in limited circumstances, and those circumstances are when the federal rate exceeds the rate allowed by state law. Because such a circumstance was not present in this case, . . . the federal remedy does not apply and is therefore not the exclusive remedy." *Id.* 10-11a.

If certiorari were granted, the inapplicability of DIDA to the facts of this case would preclude this Court

from deciding whether DIDA completely preempts state-law claims where it *does* apply. Indeed, this Court's first attempt to decide whether ERISA completely preempts state-law claims failed for the same reason. *See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 24-25 (1983) (not reaching the question whether "any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court" because neither of the "claims in this case comes within the scope of one of ERISA's causes of action"). Because the complaint in this case does not come "within the scope" of DIDA, this case is an unsuitable vehicle to explore the complete-preemption issue.

A. Petitioners' "Interest" Argument Was Not Addressed Below and Would Not Have Changed the Outcome In Any Event.

Notably, petitioners do not challenge the Eighth Circuit's stated basis for concluding that DIDA was inapplicable—namely, that the rate prescribed by DIDA did not exceed the applicable interest rate under Missouri law. Instead, petitioners contend that the Eighth Circuit's decision was wrong on a ground not addressed in the decision below. Because "this is a court of final review and not first view," that is reason enough to deny certiorari. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (dismissing writ as improvidently granted).

Petitioners contend that the Eighth Circuit erred by failing to regard the loan fees at issue as "interest" within the meaning of DIDA. Pet. 26 n.9. The Eighth Circuit did not address that question because it had no need to do so. The rate prescribed by DIDA is "a rate of not more than 1 percent per centum in excess of the discount rate on ninety-day commercial paper in effect at

the Federal Reserve bank . . . or . . . the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater." 12 U.S.C. § 1831d(a). The statute mandates a comparison between that "prescribed" rate and the state-law rate. *Id.* (substantive provision applies if the "applicable rate prescribed in this subsection" exceeds the state-law rate); *id.* § 1831d(b) (remedy provision applies if "the rate prescribed in subsection (a)" exceeds the state-law rate). As the Eighth Circuit explained, DIDA's remedy "only applies in limited circumstances and those circumstances are when the federal rate exceeds the rate allowed by state law." App. 10-11a; *see also In re Lawson Square, Inc.*, 816 F.2d 1236, 1239-40 (8th Cir. 1987) (same).

The petition says that, if the fees were "interest," the Eighth Circuit should have "compare[d] the loan fees permitted by DIDA (*i.e.* the fees allowed by the law of California, First Plus Bank's home state) to the fees permitted by Missouri law, as well as comparing the periodic interest rates." Pet. 25. But the relevant comparison is between the applicable Missouri rate and the prescribed rate under DIDA. To the extent that such a comparison could logically be made with respect to loan fees, the fees would have to be included in the total overall interest calculation. The Missouri rate was 20.04% for the Thomas plaintiffs' initial loan and unlimited as to the rest. So long as Missouri law would permit a bank to charge a total overall interest rate (including appropriate fees) that equaled or exceeded the prescribed rate, DIDA would not apply. Thus, even if the Eighth Circuit had agreed with petitioners that the fees at issue were

"interest," that answer would not have changed the outcome below.[1]

B. Petitioners' "Interest" Argument Is Factbound and Fails On Its Own Terms.

In an effort to manufacture a conflict with one of this Court's decisions, petitioners claim that the decision below runs contrary to *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which upheld a regulation of the Office of the Comptroller of Currency (OCC), construing "interest" under the National Bank Act to include certain loan fees, including late charges. Pet. 24-27.

But as the petition acknowledges in a footnote, "not all loan fees constitute interest" under the OCC regulation upheld in *Smiley*. Pet. 26 n.9. Petitioners' argument thus turns not on the legal issue decided in *Smiley* (whether fees may constitute interest at all) but on the narrow, factbound question whether the *specific fees* challenged in plaintiffs' complaint would, under the relevant regulatory materials, constitute "interest" within

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[1] Petitioners (at 26) conspicuously cite no authority for their claim that the applicable California rate was unlimited. An unlimited California rate, in any event, could never *exceed* an unlimited Missouri rate. And even if it were possible for this Court to engage in the first instance in the comparative analysis that petitioners propose, the analysis would be factbound, differing for the various loans at issue. The rate for the Thomases' first $6,000 loan would be 19.2% under California law. *See* Cal. Fin. Code §§ 18212, 18212.1. Missouri's 20.04% rate thus exceeded California's rate. *See* Resps. CA8 Reply 36-41. The allowable interest rate under the MSMLA was *unlimited* at the time respondents took out their other loans. App. 10a. The California rate thus could not have exceeded the maximum Missouri rate. Moreover, FirstPlus, as a California industrial loan corporation, was not authorized under California law to make the loans at issue at *any rate*. *See* Resps. CA8 Br. 32-38.

the meaning of DIDA. Petitioners' grievance, in other words, is that the decision below misapplied the law to the facts. Indeed, the petition contrasts the decision below with a "quite similar" case in which the Eighth Circuit, in petitioners' view, "correctly applied *Smiley*" to conclude that certain loan fees were "interest." Pet. 26-27 (citing *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005)). A petition for certiorari, however, is "rarely granted" where, as here, "the asserted error consists of . . . a misapplication of a properly stated rule of law." S. Ct. Rule 10.

The Federal Deposit Insurance Corporation, which administers DIDA, has generally adopted the OCC regulation upheld in *Smiley* for purposes of the Federal Deposit Insurance Act, of which DIDA is a part. *See General Counsel's Opinion No. 10: Interest Charges under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258 (April 17, 1998). That OCC regulation, in turn, defines "interest" as "payment compensating a creditor or prospective creditor for an extension of credit." 12 C.F.R. § 7.4001(a). It includes not only "numerical periodic rates," but also "late fees," "overlimit fees, annual fees, cash advance fees," and other fees associated with "credit extension or availability." *Id.* It excludes "all other payments," such as "reimbursement of the lender's costs in processing the application, insuring the loan, and appraising the collateral." *Smiley*, 517 U.S. at 741. As *Smiley* explained, the OCC regulation distinguishes "between those charges that are specifically assigned to such expenses" (which are not interest) "and those that are assessed for simply making the loan, or for the borrower's default" (which are interest). *Id.*

In this case, the plaintiffs' state-court complaint challenged only two categories of non-interest fees—

specifically, "finders' fees or brokers' fees" and "certain closing costs and fees [charged] on behalf of third parties." App. 4a. The plaintiffs alleged that FirstPlus Bank, after originating their loans, "would 'transfer' a 'broker's fee' (or finder's fee)" to a marketing affiliate, as compensation for "solicit[ing] the loan business" from consumers. *See* D. Ct. Doc. No. 1-4 at ¶ 15(e) (state-court complaint). The complaint also alleged that FirstPlus Bank charged, among other things, "certain closing costs and fees on behalf of third parties" that "were in excess of costs actually charged by those third parties and then retained the difference." App. 4a. That practice violated the Missouri Second Mortgage Loans Act, which authorized only "[b]ona fide closing costs paid to third parties," which are limited to "fees or premiums for title examination, title insurance, or similar purposes," fees for "preparation of a deed, settlement statement, or other documents," "fees for notarizing deeds and other documents," "appraisal fees," and "fees for credit reports." Mo. Rev. Stat. § 408.233.1(3).

Both categories of fees—finders' fees and the third-party closing costs listed above—are excluded from the definition of "interest" under the OCC regulation on which petitioners rely. Finders' fees are expressly excluded. *See* 12 C.F.R. § 7.4001(a) ("The term 'interest' . . . does not ordinarily include . . . finders' fees."); *see Mamot Feed Lot and Trucking v. Hobson*, 539 F.3d 898, 903 (8th Cir. 2008) ("The regulation explicitly excludes from the definition of 'interest' such fees as . . . finders fees."). And although the regulation does not use the term "closing costs," the other third-party loan fees contemplated by the complaint are expressly excluded. *See* 12 C.F.R. § 7.4001(a) (excluding "appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, fees for document

preparation or notarization, or fees incurred to obtain credit reports"); Kaplinsky, *Exportation Litigation: Analysis and Implications of United States Supreme Court Opinion in Smiley v. Citibank*, 989 PLI/Corp. 313, 329 (1997) ("Because of the OCC's regulation, certain other fees, most notably appraisal fees, document preparation fees, finders' fees, notarization fees, credit report fees and fees for guaranteeing payment of any loan (collectively 'Closing Costs'), are probably not 'interest.'"). In any event, the finders' fees and third-party loan fees at issue here were not interest because they compensated a third party, and thus were not "payment compensating a creditor or prospective creditor for an extension of credit." 12 C.F.R. § 7.4001(a).

In an effort to cram the facts of this case into the relevant regulatory definition of "interest," the petition urges this Court—in the first instance—to "look beyond" the plaintiffs' complaint (Pet. 27) and view the fees at issue as "origination fees" rather than, as the Eighth Circuit characterized them, finders' fees and closing costs. *Compare* Pet. 26 n.9 (discussing "origination fees") *with* App. 4a (discussing "finders' fees" and "closing costs"); *see also* Petrs' CA8 Br. 21 ("Although [plaintiffs'] claims are facially alleged in terms of excessive 'fees' rather than a percentage-based interest rate, they actually constitute claims for excessive 'interest[.]'"). Regardless of whether "origination fees" as a general matter may constitute interest, the fees at issue here were, as described above, specifically assigned to cover particular costs or services. Furthermore, regardless of whether they are "origination fees" in a general sense, they are not "interest" because they were collected for a third party rather than as compensation for extension of credit by the lender.

Because the fees at issue are not "interest," DIDA is inapplicable for a second reason, in addition to the one identified by the decision below—namely, the plaintiffs are not bringing state-law usury claims at all. Indeed, many courts faced with claims of complete preemption under the National Bank Act and DIDA have found it unnecessary to reach the complete-preemption question because, on the facts at hand, the plaintiffs' state-law claims did not challenge "interest" charges.[2]

In *Beneficial National Bank v. Anderson*, which held that the National Bank Act completely preempts state-law usury claims, the Court faced no similar obstacles. The Court emphasized that the plaintiffs' state-court complaint expressly "sought relief for 'usury violations' and claimed that the defendants had 'charged . . . excessive interest in violation of the common law usury doctrine' and violated a state statute '"by charging excessive interest."' 539 U.S. 1, 9 (2003) (quoting state-court com-

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[2] *See, e.g., Brown v. NationsCredit Fin. Servs.*, 647 F. Supp. 2d 1314, 1321 (M.D. Fla. 2008) (where the "fees and charges Plaintiffs are complaining about do not squarely fit into the Regulation's definition of interest, complete preemption cannot exist"); *Bumpers v. Cmty. Bank of N. Va.*, 2008 WL 203343 (W.D. Pa. 2008) (plaintiffs challenging fraudulent fees were not "asserting claims for usury," which is "defined as when a lender charges a rate of interest that is higher than legally allowed by law"); *Saxton v. Capitol One Bank*, 392 F. Supp. 2d 772, 783 (S.D. Miss. 2005) ("Plaintiff's claims are not in fact usury claims."); *Cross-County Bank v. Klussman*, 2004 WL 966289, at *5-6 (N.D. Cal. 2004) (same); *Hunter v. Beneficial Nat'l Bank USA*, 947 F. Supp. 446, 452 (M.D. Ala. 1996) ("Because, on the present record, it appears that plaintiffs' state-law claims do not fall within the coverage of [the Act], the claims cannot be completely pre-empted by the Act."); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046, 1048-49 (S.D. Ala. 1996) ("[P]laintiffs' claims are not 'usury' claims" because they are "not disputing the rate of interest charged by defendants.").

plaint). Because the complaint "unquestionably and unambiguously claim[ed] that petitioners violated usury laws," the Court was able to squarely decide the complete-preemption question under the National Bank Act. *Id.* at 11.

Here, by contrast, the state-court complaint concerns only non-interest fees under the relevant administrative interpretations, and expressly disavows any claim of usury. D. Ct. Doc. No. 1-4 ¶ 2 ("[P]laintiffs make no claim that the illegal charges were interest or that the [loans] were usurious under any applicable law."). Under the circumstances, this case is a manifestly unsuitable vehicle to address complete preemption under DIDA.

II. There Is No Circuit Split Concerning Complete Preemption Under DIDA.

The petition's principal argument for certiorari is its claim of a circuit split between the decision below and the Third and Fourth Circuits over whether DIDA completely preempts state-law claims that fall within its scope. Pet. 13-15. There is no such circuit split.

1. Petitioners' claimed split hinges on a mischaracterization of the decision below. The petition asserts that the Eighth Circuit held that DIDA categorically "does not completely preempt state-law usury claims against federally insured state banks." Pet. 13. To the contrary, as discussed above, the Eighth Circuit held only that DIDA's remedy, and hence its preemptive effect, applies in "limited circumstances"—*i.e.* when the prescribed rate "exceeds the rate allowed by state law"—and did

not apply here because "such a circumstance was not presented in this case." App. 10a-11a.[3]

In reaching that narrow holding, the Eighth Circuit followed one of its own prior precedents, *In re Lawson Square, Inc.*, 816 F.2d 1236, 1239-40 (8th Cir. 1987) (not cited in the petition), which held that DIDA does not apply where the state-law interest rate exceeds the rate set by DIDA. App. 9a-11a (discussing *Lawson Square*). *Lawson Square* did not address complete preemption.

Because the Eighth Circuit did not decide the complete-preemption question presented by the petition, the decision below cannot form any part of a circuit split on that question.[4]

2. The petition also mischaracterizes the Third Circuit's opinion in *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005). Contrary to the petition's description, the Third Circuit, like the Eighth

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[3] *See* Cassling, *The Depository Institutions Deregulation and Monetary Control Act ("DIDA") Does Not Preempt State Law When the Applicable State Law Allows a Higher Rate Than the Interest Rate Allowed by DIDA*, 127 Banking L.J. 276, 278 (2010) (recognizing limited nature of holding).

[4] The petition (at 15 n.5) also identifies a purported conflict among the district courts. But the only two decisions that the petition identifies as having rejected complete preemption under DIDA in fact held, like the Eighth Circuit, that DIDA did not apply to the facts of those cases. *See Saxton*, 392 F. Supp. 2d at 783 ("The Court finds that Plaintiff's claims are not in fact usury claims, that is claims challenging the 'rate of interest' charged by an FDIC-insured state bank within the meaning of DIDA. [T]his . . . alone is enough to take the case outside the ambit of this court's federal-question jurisdiction."); *Partin*, 948 F. Supp. at 1048-49 ("[P]laintiffs' claims are not 'usury' claims.").

Circuit below, found no complete preemption under DIDA on the facts of that case.

The Third Circuit was able to "set aside the issue" of whether the "fraudulent origination and title service fees" at issue were "interest" under DIDA because complete preemption failed for "two more substantial, and ultimately determinative, issues." *Id.* at 296. First, the court explained, DIDA "appl[ies] only to . . . state chartered banks, not to non-bank purchasers of second mortgage loans." *Id.* at 296. Because the removing defendants were not banks, the state-law claims against them "could not be preempted by . . . the DIDA." *Id.* at 297. Second, the complaint on which removal was premised did not "plead any state law usury claims" and so "[i]t follow[ed] that removal was improper." *Id.*

Moreover, the complaint as amended after removal "explicitly asserted federal claims," thus unambiguously creating federal-question jurisdiction in any event. *Id.* at 298. Because there was federal jurisdiction anyway, and because the court rejected any possibility of complete preemption on the facts, the Third Circuit's speculation about whether there would have been complete preemption under DIDA if the case *had* involved state-law usury claims against state-chartered banks, *id.* at 295, was dictum. And that dictum is particularly insignificant because it occupies less than one paragraph of a 72-page opinion, in a case in which no party briefed or argued the issue of complete preemption under DIDA.

3. The third leg of the alleged conflict is the Fourth Circuit's decision in *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd for lack of jurisdiction*, 129 S. Ct. 1262 (2009). In *Discover Bank*, as in *Community Bank*, the question of complete preemption under DIDA was not a subject of disagreement among the parties. *See*

id. at 604 n.10 (noting that "Vaden 'conceded' that [DIDA] completely preempted her state-law claims").

Aside from the lack of adversarial presentation on the issue, the Fourth Circuit's discussion of complete preemption occurred as part of a jurisdictional inquiry that this Court later concluded was improper. The Fourth Circuit was attempting to determine whether the district court had subject-matter jurisdiction over Discover Bank's petition to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 4. In making that determination, the court looked not to Discover Bank's state-law collection action, but to Betty Vaden's state-law counterclaims against Discover Bank for usury. The court concluded that federal subject-matter jurisdiction would exist because her counterclaims were completely preempted by DIDA. This Court, however, held that the Fourth Circuit's approach was erroneous. *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009). The Fourth Circuit should never have reached the complete-preemption question in the first place, the Court held, because "federal jurisdiction cannot be invoked on the basis of a defense or counterclaim." *Id.* at 1278; *see also id.* at 1277 n.7 ("Vaden did not invoke the [DIDA]. Indeed, she framed her counterclaims under state law and clearly preferred the Maryland forum.").

Attempting to create the appearance of a split, the petition quotes, out of context, the Eighth Circuit's observation that the Fourth Circuit had "interpreted the language in § 1831d differently." App. 11a. Read in context, it is clear that the Eighth Circuit's point was a narrow one—that the Fourth Circuit in *Discover Bank* had quoted the same statutory provision but omitted the conditional clause on which the decision below relied, and thus did not analyze the threshold question decided by

the Eighth Circuit. App. 11a-12a. In any event, the petition does not claim that the conditional clause would actually have made any difference on the facts of *Discover Bank*. Betty Vaden's counterclaims clearly "challenge[d] certain fees and interest rates on her Discover Card account," which she argued were in violation of Maryland statutes regulating "interest on consumer credit accounts." *Discover Bank*, 489 F.3d at 606. Her counterclaims thus fell "squarely within the FDIC's definition of 'usury' charges." *Id.* (citing 12 C.F.R. § 7.4001(a)). No party claimed that the applicable state rate there, as here, was higher than the prescribed federal rate.

* * *

In summary, the Eighth Circuit and the Third Circuit both failed to reach the complete-preemption question because they concluded that DIDA did not apply to the facts of the case—that is, the state-law claims did not come within the statute's scope. The Fourth Circuit, meanwhile, engaged in a discussion of complete preemption under DIDA that this Court later concluded was entirely unnecessary. The petition does not contend that any other circuits have decided the question.

In the thirty years since DIDA's enactment, not one federal circuit has squarely decided whether the statute completely preempts state-law claims that come with its scope under circumstances where it was actually necessary to reach that question. That fact not only undermines the petition's claim of a circuit split, but also belies the claim (Pet. 16-17) that the question is a recurring or important one. Accordingly, even if this case were a suitable vehicle to address the question, review would be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 09-1161

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Eighth Circuit held in this case that section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), codified at 12 U.S.C. § 1831d, does not completely preempt respondents' claims that a California-chartered bank charged them origination and other fees in excess of the limits

imposed by Missouri law. That holding created a circuit conflict, as the court of appeals recognized. *See* Pet. App. 11a. The Eighth Circuit's erroneous conclusion, and the disuniformity it has created, are harmful to state-chartered banks and to the national economy, in which those banks play a key role. *See* Pet. 16-17; *see also* Amicus Br. for Am. Bankers Ass'n et al. 10-14. When faced with similar considerations in *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), which involved the same issue as this case but in regard to national banks, the Court granted certiorari to resolve a 1-1 circuit conflict. The Court should take the same approach here.[1]

Respondents offer no valid basis to do otherwise. They do not defend the merits of the Eighth Circuit's interpretation of DIDA—ignoring petitioners' myriad challenges to that interpretation, *see* Pet. 17-24—nor do they address the importance of avoiding disuniformity in this context. Instead, respondents deny the exis-

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[1] *Anderson* is not the only case in which this Court has granted review promptly to address issues implicating the need for uniform interpretation of federal banking law. *See Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 & n.2 (1996); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 307 & n.17 (1978). Indeed, in *Household Credit Services, Inc.* v. *Pfennig*, 541 U.S. 232 (2004), the Court granted certiorari despite the absence of a clear circuit conflict, after the Solicitor General's invitation brief explained the need for "clear and uniform national standards for nationwide creditors," the threat the Sixth Circuit's decision in that case posed to such uniformity, and the fact that that decision departed from this Court's precedent, which is analogous to the Eighth Circuit's departure here from *Smiley* and *Anderson*. *See* Brief for United States as Amicus Curiae 7, 10-11, *Pfennig*, No. 02-857 (May 30, 2003), *available at* 2003 U.S. S. Ct. Briefs LEXIS 1251, **14, **18-20.

tence of the circuit conflict and posit the presence of vehicle problems. Neither assertion has merit.

I. THERE ARE NO VEHICLE PROBLEMS

Respondents contend (Opp. 5-6) that this case is not a good vehicle to decide the first question presented because the Eighth Circuit made a threshold ruling that DIDA does not apply on the facts here. But it is that very ruling that created the circuit conflict, and thus the need for this Court's review. The Eighth Circuit held that because of the "if" clauses in § 1831d, DIDA has no application to respondents' state-law usury claims, *see* Pet. App. 7a (referring to "limited nature of [DIDA]'s preemptive effect"); *id.* at 8a (similar)—even though under *Anderson* identical usury claims based on loans by a national bank would have been completely preempted by the National Bank Act (NBA), *see* 539 U.S. at 9-11, and even though Congress's express goal in adopting § 1831d was to give state and national banks identical protection from state usury laws.[2] That holding by the Eighth Circuit conflicts with decisions from other circuits, which concluded that DIDA completely preempts all state-law usury claims against state-chartered banks. *See In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (DIDA "completely preempts *any* state law attempting to limit the ... interest and fees a federally insured-state chartered bank can charge." (emphasis added)), *quoted in Discover Bank* v. *Vaden*, 489 F.3d 594, 605 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009). Respondents cannot evade review of

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[2] Respondents' assertion that their claims are not usury claims is meritless. *See infra* pp.9-10.

the statutory ruling at the heart of this case, a ruling that is in no way "case-specific" (Opp. 5), simply by labeling it a threshold matter.

The Eighth Circuit was able to conclude that DIDA does not apply here, moreover, *only* by interpreting the term "interest" in § 1831d to mean periodic interest rates but not certain non-periodic fees, *see* Pet. App. 10a; *see also* Pet. 25 (citing Pet. 9-10)—an interpretation that plainly conflicts with *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). Respondents advance several arguments in suggesting (Opp. 6-13) that this conflict with *Smiley* actually makes the case less suitable for review rather than more. Respondents repeatedly contend, for example, that petitioners are merely making a "factbound" challenge (Opp. 8) to the Eighth Circuit's ruling. That is incorrect. Petitioners' argument (Pet. 24-27) is that the Eighth Circuit's construction of a term in a federal statute is inconsistent with this Court's case law interpreting the same term. That is not a factbound issue but a quintessentially legal one (and, indeed, the basis for petitioners' second question presented). Respondents argue as though the court of appeals acknowledged the rule of *Smiley* but then concluded that the origination fees underlying respondents' claims were not "interest" under DIDA. That is manifestly not what occurred here. The court simply ignored *Smiley*. Far from being a reason to let the decision below stand, the Eighth Circuit's disregard for this Court's precedent underscores the need for certiorari—particularly given the close connection between the Eighth Circuit's erroneous interpretation of "interest" and its flawed complete-preemption ruling.

Respondents also assert (Opp. 6) that review should be denied because the Eighth Circuit did not

expressly address the definition of "interest" and because had it done so the result would not have changed. Both contentions are wrong. To begin with, contrary to respondents' claim (Opp. 1) that "this Court typically refrains from deciding issues not passed on by the court below," the Court has made clear that "[a]ny issue pressed *or* passed upon below" may be reviewed by certiorari. *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (emphasis added) (internal quotation marks omitted); *see also, e.g., United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("[T]his rule operates (as it is phrased) in the disjunctive."). Respondents' preferred approach would allow courts to immunize their decisions from review simply by declining to expressly address arguments presented to them. And even were the rule as respondents posit, the Eighth Circuit's opinion leaves no doubt that the court's analysis was indeed based on the infirm legal conclusion that "interest" in DIDA means only periodic rates. *See* Pet. App. 10a.

Respondents likewise err in contending that none of the fees on which their claims rest constitutes "interest" under DIDA, and hence the Eighth Circuit's ruling would have been the same even had the court explicitly addressed the definition of "interest" and followed *Smiley*. Respondents state (Opp. 9) that in initiating this action they "challenged only two categories of non-[periodic-]interest fees," finders' or brokers' fees and certain closing costs. But as petitioners showed (Pet. 9-10), respondents' state-court petition and their federal-court complaint both alleged that respondents were charged a 10% "origination fee" from which respondents sought relief. *See* Dkt. No. 1-3 ¶ 67 (state-court

petition); Dkt. No. 43, ¶¶ 67, 72 (amended complaint).[3] These allegations were incorporated by reference into respondents' actual claims, *see* Dkt. No. 1-3, ¶ 72; Dkt. No. 43, ¶ 75, where respondents alleged that the origination fees "were not allowed by and in excess of what fees are allowed by [Mo. Rev. Stat. §] 408.233.1(5)." Dkt. No 1-3, ¶ 84(a); Dkt. No. 43, ¶ 87(a). And that provision pertains *only* to origination fees. *See* Mo. Rev. Stat. § 408.233(1)(5) (allowing "[a] nonrefundable origination fee not to exceed five percent of the principal").[4] Respondents' contention that their claims do not involve origination fees is demonstrably wrong.[5]

Respondents' fallback position (Opp. 10, 11) is that the origination fees at issue here are not interest "because they compensated a third party." But neither respondents' state-court petition nor their federal-court complaint alleged that the origination fees were paid to third parties. That is unsurprising, because an origination fee is charged by the lender to process the loan application, i.e., as part of the extension of credit. *See Smiley*, 517 U.S. at 742 (charges "assessed for simply

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[3] All docket numbers cited pertain to case number 5:04-cv-06098-HFS (W.D. Mo.).

[4] The version of this provision applicable to some of respondents' loans limited origination fees to two percent of the principal but was otherwise identical to the current version.

[5] Respondents accuse petitioners of "urg[ing] this Court ... to 'look beyond' the plaintiffs' complaint" in determining what fees their claims involve. Opp. 11 (quoting Pet. 27). That is false. On the factual question of which fees underlie respondents' claims, petitioners cited only respondents' state-court petition and their federal-court complaint—the best sources. *See* Pet. 9, 10. Respondents, by contrast, repeatedly rely on the Eighth Circuit's opinion. *See* Opp. 2, 10, 11.

making the loan" constitute "interest"). Respondents' failure to allege in their state-court petition or federal-court complaint that the origination fees were paid to a third party confirms that those fees are "interest" under DIDA.[6]

Respondents alternatively assert (Opp. 7-8 & n.1) that the Eighth Circuit's departure from *Smiley* did not affect its decision because the comparison of state interest-rate limits required under DIDA involves, they say, combining limits on periodic rates with limits on other fees to produce a single maximum rate for each state. Because Missouri law imposed no limit on periodic rates for part of the relevant period, the argument continues, it is impossible for California's rate to have exceed Missouri's, no matter what Missouri's limits on non-periodic fees were. That assertion is without merit.

As an initial matter, respondents themselves recognize (Opp. 7) that the aggregation that they say is required often cannot be done. Missouri's origination-fee limit of five percent of the principal, for example, *see* Mo. Rev. Stat. § 408.233(1)(5), cannot meaningfully be combined with Missouri's pre-1998 periodic interest limit of 20.04 percent per year, *see id.* § 408.232(1). Although flat fees can be converted to periodic rates on particular loans, *see, e.g.*, *Smiley*, 517 U.S. at 741, such a

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[6] Respondents—who rightly acknowledge (Opp. 9) that the FDIC has adopted the same definition of "interest" under DIDA that the Office of the Comptroller of the Currency (OCC) has adopted for the NBA—notably ignore petitioners' argument (Pet. 26 n.9) that an origination fee is directly analogous to a line-of-credit opening fee, which the OCC has authoritatively deemed to be "interest."

conversion is impossible in the abstract, i.e., without a specific loan amount and duration. But that does not mean that such "interest" is to be ignored for purposes of DIDA or any other usury limit.

More fundamentally, respondents' argument would effectively eliminate the protection that Congress gave state banks in passing DIDA. DIDA prevents States from imposing their usury limits on other States' banks, by authorizing state banks to charge the maximum rates allowed by their home States to any lender. *See* 12 U.S.C. § 1831d(a). Under respondents' view, any State that (like Missouri) set no limit on periodic rates but did limit non-periodic "interest" charges could impose those limits on federally insured state-chartered banks (its own or other States'), because the periodic/non-periodic aggregation that respondents say is required would yield no limit. Similarly, a State that set a limit on periodic rates but not on non-periodic fees could impose that limit on federally insured state-chartered banks (its own or 'other States'). Again, that would all but erase the core protection Congress sought to give such banks in passing DIDA. The proper question under that statute is simply whether a State's usury laws would prevent a federally insured state bank from charging *any* type of "interest" (periodic or non-periodic) that is permitted for other lenders by the bank's home State. If so, then claims based on those laws are completely preempted. And that is the situation here, because respondents' claims are based on a Missouri law that limits origination fees (i.e., "interest") more strictly than California law does.[7]

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[7] Respondents do not dispute that California generally does not limit state banks' imposition of origination fees. But respon-

Finally, respondents attempt to distinguish *Anderson*, stating that there "the plaintiffs 'unquestionably and unambiguously' alleged usury violations." Opp. 1 (quoting *Anderson*, 539 U.S. at 11); *accord* Opp. 12-13. But the same is true here: As explained, *see supra* pp.5-6, respondents claimed that they were charged loan fees exceeding those allowed by Missouri law. That is "unquestionably and unambiguously" a usury claim. Respondents' repeated contrary contention (*e.g.*, Opp. 2, 12) could be correct only if "usury" were restricted to excessive periodic-rate charges. That is not the law. *See Smiley*, 517 U.S. at 745-746 (citing cases "holding that flat charges violated state usury laws"); *see also, e.g.*, *Affiliated Acceptance Corp.* v. *Boggs*, 917 S.W.2d 652, 658 (Mo. Ct. App. 1996) ("The Boggs also claim that the additional ... fees, including a ten percent origination fee, were usurious.").[8] The only difference in this regard between this case and *Anderson* is that respondents' pleadings consciously avoided using the word "usury." Respondents believe that suffices to defeat federal jurisdiction. *See, e.g.*, Opp. 13. They are

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dents assert (Opp. 8 n.1) that as an industrial loan corporation, FirstPlus was not authorized under California law to make the loans at issue here at any interest rate. True or not, that is irrelevant because under DIDA, FirstPlus could charge the maximum interest permitted by California law for any lender. *See* 12 U.S.C. § 1831d(a); 12 C.F.R. § 7.4001(b); *Marquette*, 439 U.S. at 314 & n.26 (citing *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874)); *"Most Favored Lender" Doctrine Applies To Insured State Banks*, FDIC Advisory Op. 81-3 (Feb. 3, 1981), *available at* http://www.fdic.gov/regulations/laws/rules/4000-730.html.

[8] That respondents have sought a refund of all interest charged on the relevant loans (*see* Pet. 9) further confirms that their claims are for usury.

mistaken. *See Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("If a court concludes that a plaintiff has 'artfully pleaded' claims [so as to omit necessary federal questions], it may uphold removal[.]"). This case is thus just like *Anderson* in all pertinent respects. The Court should grant certiorari here, as it did there.

II. THE CIRCUIT CONFLICT IS CLEAR

Respondents next contend (Opp. 13-17) that the circuit conflict described in the petition does not actually exist. While certiorari would be warranted even if respondents were correct—given the clarity of the Eighth Circuit's error and the tension between its ruling and this Court's decision in *Anderson*—they are not correct.

According to respondents, the Eighth Circuit "did not decide the complete-preemption question," Opp. 14, instead holding only that DIDA "did not apply here," Opp. 13-14. As explained, however, *see supra* p.3, it is precisely that holding—that DIDA applies only in "limited circumstances," Pet. App. 10a—that created the circuit conflict. The Eighth Circuit itself recognized that its interpretation of § 1831 was creating such a conflict, observing that "other federal courts have interpreted the language of § 1831d differently." Pet. App. 11a. Respondents assert (Opp. 16) that petitioners quote this language "out of context," but they then go on to reiterate the same argument that petitioners made, namely that the Eighth Circuit's point was that other courts have disagreed with its view that the "if" clauses in § 1831 mean that not all state-law usury claims against state banks are completely preempted. That is the basis for the first question presented here.

As to the Fourth Circuit's decision in *Discover Bank* v. *Vaden*, respondents state first (Opp. 15) that there the complete-preemption question "was not a subject of disagreement among the parties." But no such "disagreement" is required to create a holding. In any event, the Fourth Circuit did not simply accept the parties' agreement, as respondents imply. As this Court noted, the court of appeals instead "[r]ecogniz[ed] that 'a party may not create jurisdiction by concession,'" and thus "conducted its own analysis of [§ 1831d], ultimately concluding that the provision completely preempted state law." *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1269 (2009) (quoting *Discover Bank*, 489 F.3d at 604 n.10).

Respondents next contend (Opp. 16) that this Court's reversal on different grounds in *Vaden* vitiates the Fourth Circuit complete-preemption holding. But this Court made clear that the complete-preemption question was distinct from those it addressed, stating that it was "express[ing] no opinion" on "the question of [DIDA]'s preemptive force." 129 S. Ct. at 1269 n.4. Respondents cite no authority for their suggestion that this Court's decision in *Vaden* affects the Fourth Circuit's complete-preemption holding—and one court in that circuit has already deemed that holding "intact." *See West Virginia* v. *Cashcall, Inc.*, 605 F. Supp. 2d 781, 785 n.5 (S.D. W.Va. 2009) ("The [Supreme] Court did not ... address the question of complete preemption with respect to § [1831d]. Accordingly, the Fourth Circuit's holding on that issue remains intact[.]"); *see also Central Pines Land Co.* v. *United States*, 274 F.3d 881, 894 (5th Cir. 2001) ("[Our] decision in *Rogers* ... had been reversed by the Supreme Court on other grounds. Nevertheless, this Court [subsequently] held that the decision of the *Rogers* panel was still binding, because

the Supreme Court had not explicitly or implicitly overruled our panel opinion." (footnote omitted)).

Respondents also argue (Opp. 15) that the complete-preemption ruling in *In re Community Bank* was dictum because there were other bases for federal jurisdiction. But those bases pertained to different claims. *See* 418 F.3d at 298. The Third Circuit thus still had to decide whether the district court had original (rather than supplemental) jurisdiction over the claims removed under DIDA. And its resolution of that question, like the Fourth Circuit's decision in *Vaden*, has been regarded by courts as a holding. *See Discover Bank*, 489 F.3d at 605; *Bumpers* v. *Community Bank of N. Va.*, No. 03-cv-1380, 2008 WL 203343, at *3-*4 (W.D. Pa. Jan. 24, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, THE CLEARING HOUSE ASSOCIATION L.L.C., CONSUMER BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE AND MISSOURI BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This brief is submitted by *Amici Curiae* American Bankers Association, The Clearing House Association L.L.C., Consumer Bankers Association, The Financial Services Roundtable and Missouri Bankers Association ("*Amici*") in support of Petitioners US Bank National Ass'n ND; US Bank National Ass'n; FirstPlus Home Loan Trust 1996-2; FirstPlus Home Loan Owner Trusts 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5; Wilmington Trust Co.; Goleta National Bank; Residential Funding Co., LLC; Sovereign Bank; and HSBC Financial Corp., f/k/a Household Financial Corp. Petitioners and Respondents have consented to the filing of this brief by letters accompanying this brief.[1]

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the domestic assets of the banking industry in the United States.

The Clearing House Association L.L.C. ("The Clearing House") is an association of leading commercial banks that, through an affiliate provides

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was prepared in its entirety by *Amici* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *Amici*, their members or their counsel.

payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House often appears as *amicus curiae* in cases that present issues of importance to the banking industry.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue and 2.3 million jobs.

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[2] The members of The Clearing House are Bank of America, N.A., The Bank of New York Mellon, Capital One, N.A., Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., The Royal Bank of Scotland, N.V., UBS AG, U.S. Bank N.A. and Wells Fargo Bank, N.A.

The Missouri Bankers Association ("MBA") is the principal advocate for the banking industry and is dedicated to providing products and services that bring benefits to its members. Founded in 1891, the MBA's membership includes commercial banks and savings and loan associations representing over 1,800 banking locations and over 30,000 bank employees in the state of Missouri.

The underlying dispute in this case involves loans acquired by Petitioners sometime after their origination by FirstPlus Bank, a state bank whose deposits were insured by the Federal Deposit Insurance Corporation (the "FDIC"). Petitioners and *Amici* are asking this Court to review (and ultimately reverse) an erroneous decision that contradicts Congress' express intent. If allowed to stand, the decision would restrict the ability of state banks to remove litigation to a federal forum and severely disadvantage state banks when they make interstate consumer loans, including credit card, private student, home equity and automobile loans.

Congress enacted Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d ("Section 27"), with the explicit purpose to "prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates." In recognition of Congress' expressed intent and its use of virtually identical language in Section 27, which applies to state banks, and 12 U.S.C. §§ 85-86 ("Sections 85-86"), applicable to national banks, federal courts and the FDIC have, from the time of Section 27's enactment in 1980 through the present, uniformly treated state banks and national banks the same with regard to the interest they may charge. *See, e.g., Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971

F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); *Discover Bank v. Vaden*, 489 F.3d 594, 605 n.14 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009); *General Counsel's Opinion No. 10: Interest Charges Under Section 27 of the Federal Deposit Insurance Act*, 63 Fed. Reg. 19,258 (Apr. 17, 1998) ("General Counsel Op. No. 10").

The Eighth Circuit has now departed from the consistent pre-existing understanding of Section 27 in holding that Section 27, unlike Sections 85-86, does not completely preempt state-law usury claims. If allowed to stand, its decision would deprive state banks (and companies acquiring loans from state banks) of access to the federal courts when the interest charged on their loans is challenged, even though a national bank lender would have federal question jurisdiction for the very same claim.

Further, the decision does not "merely" deprive state banks of the benefit of *complete* preemption and hence a federal forum under Section 27. In direct conflict with General Counsel Op. No. 10 and this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), the logic of the Eighth Circuit decision would narrow the scope of *ordinary* preemption provided by Section 27(a) to periodic rates of interest. The decision would thereby exclude from Section 27(a)'s protection a host of other charges constituting "interest" under Section 85 and its implementing regulation, 12 C.F.R. § 7.4001(a), as well as General Counsel Op. No. 10. This would impair the functioning of state banks, reduce the availability of consumer credit and put state banks at a competitive disadvantage to their federal counterparts. Accordingly, *Amici* respectfully urge this Court to grant Petitioners' petition for a writ of certiorari.

ARGUMENT

I. THE EIGHTH CIRCUIT'S OPINION SHOULD BE REVERSED.

There is no dispute that, if a national bank had made the loans at issue in the underlying dispute, Respondents' claims would be completely preempted under Sections 85-86 and would thus arise under federal law. However, because the loans in question were made by a state bank and hence were governed by Section 27 rather than its functional twin, Sections 85-86, the Eighth Circuit held that the claims were not completely preempted and, thus, did not provide a basis for federal-question jurisdiction. This result is at odds with the clear intention of Congress, as manifested in the express language of Section 27(a), longstanding regulatory guidance on the issue and the decisions of other courts of appeal. The decision is also contrary to this Court's ruling in *Smiley*, which the Eighth Circuit ignored entirely.

As Petitioners have cogently observed, the Eighth Circuit fundamentally erred in its interpretation of Section 27. The court dismissed without serious analysis both language in Section 27(a) and judicial and administrative authority requiring a contrary holding. At the same time, it misconstrued the language in Section 27 that formed the basis for its decision.

A. The Opinion Below Ignored The Anti-Discrimination Clause Of Section 27(a).

The very first clause of Section 27(a) explains that it is enacted "[i]n order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates." The Eighth

Circuit, however, never analyzed the consequence of this passage.

As noted above, it is undisputed that Sections 85-86 completely preempt state-law usury claims against national banks. If Section 27 does not completely preempt the same claims against state banks, manifestly Section 27 has failed in its announced purpose to "prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates."

Further, as noted below, the logic of the Eighth Circuit decision below is not limited to complete preemption but could be applied in an ordinary preemption context. The inequality of result between state banks and national banks is even more harmful as to ordinary preemption than it is with regard to complete preemption.

The decision below is wrong, if for no other reason than its discriminatory impact on state banks with respect to the interest they may charge on their loans.

B. The Opinion Below Gave Insufficient Weight To The Virtually Identical Substantive Language In Section 27(a) And In Section 85.

Section 27(a) provides in pertinent part as follows:

> [A] State *bank . . . may . . .* take, receive, reserve, and *charge on any loan . . . interest at* a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at *the rate allowed by the laws of the*

> *State, territory, or district where the bank is located*, whichever may be greater. . . . [Emphasis added.]

Section 85 provides in virtually identical terms as follows:

> [A national banking] *association may* take, receive, reserve, and *charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . . [Emphasis added.]

The Eighth Circuit acknowledged, as it must, that "other federal courts have interpreted the language in [Section 27(a)] differently" than the Eighth Circuit. App. at 11a (citing *Vaden*, 489 F.3d at 605 n.14). In fact, not just the Fourth Circuit in *Vaden* but rather *every* federal court of appeals that has considered the issue, including the First, Third and Fifth Circuits, as well, disagrees with the approach taken by the Eighth Circuit below. *See, e.g.*, *Greenwood Trust*, 971 F.2d at 827 (state-chartered banks lending under Section 27(a) have the same rights as national banks lending under Section 85); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 295 (3d Cir. 2005) (same); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519 (5th Cir. 1988) (same for savings associations).[3] These courts have empha-

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[3] Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132, adopted Section 27, applicable to state banks. Section

sized the similarity in language between Section 27(a) and Section 85, and have drawn the obvious conclusion that this parallel language is meant to be interpreted in *pari materia*.

While the Eighth Circuit at least acknowledged the existence of contrary judicial authority, it ignored FDIC guidance on the issue. The FDIC, like the courts that reached rulings inconsistent with the decision below, recognizes that Section 27 is to be interpreted in *pari materia* with Sections 85-86. General Counsel Op. No. 10 ("Section 27 was intended to give state-chartered banks the benefit of section 85 and purposefully engrafted, at several points, language from the NBA. . . . The FDIC's practice also has been to construe the two provisions similarly.") (citing *Greenwood Trust*, 971 F.2d at 826). State banks throughout the country have relied upon this administrative interpretation since its adoption.

C. The Eighth Circuit's Decision Accords Undue Importance To A Portion Of Section 27(a) That Is Immaterial To The Court's Analysis.

The entire basis for the court's decision to treat Section 27 differently from Sections 85-86 is a single clause in Section 27(a), which provides that Section 27(a) applies if "the applicable rate [of interest] prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection." As a threshold matter,

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522 of DIDA, using virtually identical language, governs interest charges by savings associations. Section 522 was originally codified at 12 U.S.C. § 1730g and was subsequently reenacted and recodified as Section 4(g) ("Section 4(g)") of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1463(g).

the clause in question "merely recognizes that if the DIDA rate is no higher than what state law authorizes, the protection the statute grants is unnecessary, as the bank can simply charge the state rates," Pet. Br. at 19-20 (citing *Gavey Props.*, 845 F.2d at 522).[4]

Moreover, the court simply *assumed*, without any analysis whatsoever, that the interest rate referenced therein was limited to the periodic rate of interest authorized on the loan. App. 10a-11a. The court ignored *Smiley* and thereby failed to consider the import of this Court's holding that the term "interest" includes a full spectrum of "interest" charges and not just the periodic rate of interest.[5]

In *Smiley*, this Court deferred to an OCC regulation defining "interest" to encompass not just interest charged at a periodic rate over time but rather "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was

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[4] As Petitioners have observed, Pet. Br. at 20, *Gavey* was decided under the original version of Section 522, 12 U.S.C. § 1730g, which contained the same language as Section 27. As Petitioners have further observed, *id.* at 21, Section 522 was recodified as Section 4(g) without the clause in question. The legislative history of Section 4(g) confirms that the recodification was meant to *preserve*, not modify, the pre-existing preemption of state usury laws.

[5] The Eighth Circuit also disregarded *its* own prior opinion in *Phipps v. Federal Deposit Ins. Corp.*, 417 F.3d 1006 (8th Cir. 2005), which followed *Smiley* on this very point. *Phipps*, 417 F.3d at 1011-1012 ("The Supreme Court has held various fees . . . are not excluded from the NBA's definition of interest simply because the fees do not vary depending on the amount owed or the length of the delay.").

extended," including a specific laundry list of charges. *Id.* at 740-745 (citing 12 C.F.R. § 7.4001(a)).

As noted above, the FDIC has been clear that its definition of "interest" under Section 27(a) is identical to the OCC's definition of interest under Section 85. *See* General Counsel Op. No. 10, concluding that "it is the Legal Division's opinion that the term "interest", for purposes of section 27, includes those charges that a national bank is authorized to charge under section 85 of the NBA. *See* 12 CFR 7.4001(a) (1997)." *See also* 12 C.F.R. § 560.110(a) (same definition for savings associations lending under Section 4(g)).

Here, the origination fees attacked by Respondents are "interest" charges under Section 85 and Section 27(a). Since the charges for "interest" in the form of origination fees permitted by Section 27(a) and the California rates assimilated into Section 27(a) exceed the amounts permitted under Missouri law, the condition to application of Section 27 argued by Respondents has in fact been met. Accordingly, Respondents' claims are subject to Section 27 and are preempted.

II. THE EIGHTH CIRCUIT'S OPINION THREATENS SEVERE INJURY TO STATE BANKS, CONSUMERS AND THE ECONOMY.

At its most basic level, the decision below deprives Petitioners—as well as approximately 5,800 state banks throughout the country—of the federal forum that should be available to them when defending completely preempted claims. This loss of a federal forum seriously disadvantages state banks.

This is not "just" a complete preemption case, however. Indeed, its impact on ordinary preemption is an even larger issue for state banks. On this score, "notwithstanding any State constitution or statute which is . . . preempted for the purposes of [Section 27]," Section 27(a) empowers state banks—just as Section 85 authorizes national banks—to "charge on any loan . . . interest . . . at the rate allowed by the laws of the State . . . where the bank is located . . . ." 12 U.S.C. § 1831d(a). And this Court's unanimous decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the seminal modern-day case under Section 85, holds that this interest authority may be "exported" from the bank's home state on loans made to borrowers in other states, without regard to borrower-state usury laws. *See also Smiley* ("interest" in the form of non-periodic credit card charges may be exported by national banks under Section 85).

The importance of Section 85, its DIDA progeny (Section 27 and Section 4(g)) and *Marquette* to the financial services industry and the public at large is hard to overstate. Since *Marquette* and the adoption of DIDA just two years later, these statutes served for years as the engine driving both the widespread availability of consumer credit and the economic strength of our consumer-based economy. *See* Baxter, W.F., *Section 85 of the National Bank Act and Consumer Welfare* (hereinafter, "Baxter"), 1995 UTAH L. REV. 1009, 1010 ("The Supreme Court's 1978 decision in [*Marquette*] undoubtedly played a major role in fostering the spectacular growth of the credit card industry. *Marquette* effectively freed the industry from overlapping state regulation of finance charges . . . ."); Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 154 (2000)

(*Marquette* led to "the dramatic expansion in the benefits associated with credit cards, such as greater customer service, co-branding and affinity cards, and a myriad of other benefits.").

The federal preemption of state law provided by *Marquette* is necessary in order to permit federally insured institutions to safely and efficiently offer their loan products nationwide. As the OCC's Chief Counsel warned: "When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, and their customers may face higher costs or more limited product offerings—or both—as a result." Testimony of Julie L. Williams, OCC Chief Counsel, Before the Subcommittee on Oversight and Investigations of the Senate Committee on Financial Services (Jan. 28, 2004). Of course, this concern applies equally to state banks.

While *Marquette* and *Smiley* arose in the context of credit card programs, the power to export "interest" from the bank's home state is not limited to credit cards. Indeed, this exportation authority is central to all manner of interstate loans, including credit card, private student, automobile, home equity and other consumer loans.

In most consumer lending, banks charge a mixture of periodic interest and other charges. For example, annual fees are an important source of revenue on credit cards. Private student loans frequently involve both periodic interest charges and origination fees. Home equity loans frequently involve origination fees, annual fees and/or other charges.

All of these fees are clearly "interest" under Section 85 and Section 27(a), as interpreted in 12 C.F.R. § 7.4001(a) and General Counsel Op. No. 10. Yet the

Eighth Circuit opinion treats them as non-"interest" charges outside the scope of Section 27 preemption. If the Eighth Circuit opinion remains intact, state banks would be limited to the exportation of periodic interest charges and/or the vagaries of conflict of laws analysis. Accordingly, they would have to increase those charges and/or reduce the amount of credit available to consumers.

Economic factors are already placing historic stress on credit availability. Indeed, Federal Reserve Board data show that outstanding consumer credit peaked in July 2008 and, with the exception of modest increases in January 2009 and 2010 (immediately after the Christmas holiday season), has consistently declined each month since then. Federal Reserve Board Statistical Release G.19, Consumer Credit (last update April 7, 2010), *available at* http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html.

The Federal Reserve Board also reported that, for every calendar quarter from the fourth quarter of 2007 through the first quarter of 2010, the majority of loan officers (and in most quarters the substantial majority of loan officers) surveyed by the Board reported that their institutions were tightening credit standards for both credit card loans and other consumer loans. Senior Loan Officer Opinion Survey on Bank Lending Practices Chart Data, Figure 4 (last update Feb. 1, 2010), *available at* http://www.federalreserve.gov/boarddocs/SnLoanSurvey/201002/chartdata.htm.

The legal uncertainty created by the decision below would undoubtedly cause problems for state banks seeking to sell or securitize their loans. And problems with secondary markets for loans inevitably reduce

the ability of banks to lend.[6] A further reduction in credit availability at the present time would constitute a hardship not only for state banks but also for the consumers who rely upon loans from state banks.

As one analyst warned:

> [T]he greatest gains from federal preemption are likely to accrue to the least well-off consumers in society. Regulatory restrictions in credit markets hurt highest-risk borrowers the most. Based on a review of the empirical literature estimating the impact of restrictive interest rate ceilings before *Marquette*, one study concludes that "lower-income families and families headed by younger persons would seem to be among those most likely to be denied credit as a result of such [interest rate] ceilings." [footnote omitted]

Baxter, 1995 UTAH L. REV. at 1023

In sum, the Eighth Circuit went fundamentally off-course on an issue of major importance.

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[6] *See Interagency Statement on Sales of 100% Loan Participations* at p. 1 (Apr. 10, 1997), *available at* http://www.ots.treas.gov/_files/84056.pdf ("A loan participation is a sharing or selling of interests in a loan. Depository institutions use loan participations as an integral part of their lending operations. Participations may be sold to enhance an institution's liquidity, interest rate risk management, capital, and earnings; diversify its loan portfolio; and serve the credit needs of its borrowers."); *Interagency Guidance on Asset Securitization Activities*, *available at* http://www.fdic.gov/news/news/financial/1999/FIL99109.pdf ("For several years, large commercial banks have been using asset securitization as an alternative method of funding balance sheet assets, improving financial performance ratios and generating fee income. [T]he OCC continues to endorse the use of asset securitization as a tool to manage the bank's balance sheet and more efficiently meet customer needs . . . .").

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, this Court should grant the Petition.

Respectfully submitted,

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